76-768

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. .....

GEORGE RIOS, *et al.*,

Petitioners,

—v.—

ENTERPRISE ASSOCIATION STEAMFITTERS, LOCAL NO. 638 OF U. A., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners George Rios, Eugene Jenkins, Eric Lewis, Wylie Rutledge and the members of the classes they represent pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on September 7, 1976.

Citations to Opinions Below

The opinion on back pay rendered by the United States District Court for the Southern District of New York is reported at 400 F.Supp. 988 and is reprinted in the Appendix to this petition at pp. 1-8. The opinion of the United States Court of Appeals for the Second Circuit affirming

in part and reversing in part the district court's back pay opinion is not yet reported and is reprinted in the Appendix at pp. 9-33. The opinion on the merits after trial is reported at 360 F.Supp. 979 and is reprinted in the Appendix at pp. 34-68. The opinion of the United States Court of Appeals for the Second Circuit affirming and remanding the trial opinion is reported at 501 F.2d 622 and is reprinted in the Appendix at pp. 82-113.[1]

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on September 7, 1976 and this petition for certiorari has been filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the lower court erred in denying back pay to those members of the plaintiff class who were discriminatorily denied access to employment opportunities as apprentices in violation of Title VII of the Civil Rights Act of 1964, as amended, on the grounds that, in the court's opinion, respondents acted without purposefully bad motive and the victim's claims are speculative.

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[1] Additional collateral opinions and orders in this case and the corresponding government action, to which reference is made in this petition, are also reproduced in the appendix.

Statutory Provision Involved

42 U.S.C. §2000e-5(g):

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this Title. (As Amended)

Statement of the Case

Petitioners seek review of a judgment of the United States Court of Appeals for the Second Circuit affirming an order (hereafter "back pay order") of the United States District Court for the Southern District of New York which denied back pay to those members of the plaintiff class who were denied employment in an apprenticeship program administered by respondents. The program was found to have unlawfully discriminated against this class on the basis of race and national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* ("Title VII"). Additionally, petitioners seek review of the court of appeals' judgment to the extent that it may absolve all respondents from back pay liability to those discriminated against by the program.

On February 26, 1971, petitioners filed this class action alleging employment discrimination in violation of Title VII and other provisions of federal law by respondents Enterprise Association Steamfitters, Local 638 of the U. A. (the "Union"), the Mechanical Contractors Association of New York, Inc. ("MCA") and the Joint Steamfitting Apprenticeship Committee of the Steamfitters Industry Education Fund ("JAC"). The district court's jurisdiction was based upon 42 U.S.C. §2000e-5(f)(3) and 28 U.S.C. §1343(3) and (4).

Following opinions and orders granting preliminary relief (App. 114-127)[2] and class action status (App. 128-133)

[2] References to relevant opinions below, all of which are reproduced in the Appendix to this petition, are noted "App. ——." References to the appendix filed below are noted "A ——," which is a reference to the Joint Appendix submitted by the parties to the court of appeals. References to certain documents appearing in the record below but not in the Joint Appendix are in the form of "Doc. ——" if from the *Rios* case and "2877 Doc. ——" if from the corresponding United States case. The document numbers cited correspond to the document numbers assigned in the Index to the Record on Appeal presented to the court of appeals.

this case was consolidated with a suit filed on June 29, 1971 by the United States against the Union and JAC.[3] Trial was held before the Honorable Dudley B. Bonsal, United States District Judge, from January 15 through January 26, 1973. On June 21, 1973, Judge Bonsal entered an Opinion finding unlawful discrimination ("Trial Opinion") (App. 34-68) and an Order and Judgment (App. 69-81) prohibiting further discrimination by the three defendants and requiring affirmative relief to correct the effects of past discrimination. The issue of back pay was reserved for later decision. None of the defendants below took appeal from the district court's findings of discrimination. However, an appeal was taken from the relief ordered by the District Judge, which was affirmed in all respects (App. 82-113) except that the case was remanded for the limited purpose "of reestablishing the percentage goals upon the basis of relevant statistical data." (App. 84).

In the district court it was shown that black and Spanish-surnamed persons were systematically denied union membership, training and employment in the steamfitting industry during the "boom years"[4] for the construc-

[3] The United States case had originally been filed against a number of New York City construction unions, apprenticeship committees and employers' associations. The district court also granted preliminary relief in the United States case (App. 134-144) which provided for the admission of 169 non-whites to the Union. Thereafter, the United States case against the Union and JAC was severed from the United States case against the other defendants, and in turn consolidated with the *Rios* case for trial before Judge Bonsal.

[4] An examination of the employment levels in the construction industry in New York City for each year from 1969 through 1975

tion industry in New York City. As a consequence, while white workers monopolized the opportunity to earn very substantial incomes, non-whites who had the necessary skills or wanted to learn these skills sustained an enormous loss of wages. This occurred largely because the apprenticeship program was used to exclude non-whites from gaining access to employment in this industry.

Unlawful discrimination was found in nearly all aspects of the industry. The district court found that the Union "in the past and continuing to the present, has engaged in a pattern and practice of discrimination against nonwhites in admission to (its journeyman) A Branch" (App. 52), the members of which enjoyed the highest paying and most secure jobs in the industry (App. 40).[5] In addition to the discriminatory A Branch admissions practices, a history of discrimination was found in the apprenticeship program, which is administered by the JAC, a joint labor-management committee of eight members, who acted as representatives of the Union and MCA.[6]

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reveals that contract construction employment stood at 104,500 in 1969; 110,100 in 1970; 111,700 in 1971. After 1971 construction employment fell to 102,800 in 1972; rose slightly to 105,000 in 1973 and dropped precipitously again to 99,900 in 1974 and to 77,900 in 1975. U.S. BUREAU OF LABOR STATISTICS BULL. No. 1370-11, EMPLOYMENT AND EARNINGS—STATES AND AREAS (1939-1974), p. 500 and VOL. 122 No. 11 U.S.B.L.S. EMPLOYMENT AND EARNINGS—STATES AND AREAS, p. 130 (SUPP., MAY, 1976). Thus, the best years of employment in this industry occurred while this lawsuit was pending, final judgment not having been rendered until June 21, 1973. Although preliminary relief in this case was granted those with journeyman skills, relief for apprentice applicants did not come until after trial.

[5] A word of mouth hiring system gave A branch members, almost invariably whites, advantages in obtaining employment (App. 54). Non-whites were limited to obtaining A branch membership through the apprenticeship program, which was itself discriminatory, while numerous whites gained direct admisssion to the A branch without passing an examination or completing the apprenticeship program (App. 42, 45, 50).

At the time of trial, the apprenticeship program was a five year program,[7] consisting of 9100 hours of fully paid employment as apprentice steamfitters and 720 hours of classroom training for most of which apprentices were paid a salary.[8]

The first apprenticeship class was formed in 1947, but until 1964 there were no non-whites in the program (App. 45-46); and discrimination continued from 1964 until the trial in 1973.[9] The apprenticeship program was virtually

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[6] It is petitioners' contention that the Union and MCA are, by virtue of their control of the JAC and the apprenticeship program, jointly liable with the JAC for the discriminatory operation of the program. As a result of the holdings below that members of the class were not entitled to back pay, this question of liability was not reached. The evidence of control of the JAC by the Union and MCA is extensive and will not be recited in this petition. (See p. 23 *infra*.)

[7] The duration of the program was subsequently reduced by the district court to four years (App. 60, 71).

[8] The district court found:

Apprentices are paid a percentage of a journeyman's wages according to the following schedule:

1st year	40% of journeyman wages
2nd year	50% of journeyman wages
3rd year	60% of journeyman wages
4th year	70% of journeyman wages
5th year	85% of journeyman wages

In addition, apprentices receive fringe benefits. The collective bargaining agreement also requires contractors to pay apprentices for five of the seven hours of class which apprentices attend once every week, with some members of MCA voluntarily paying apprentices for the full 7-hour work day (App. 45).

[9] The district court found:

Since 1964, 492 apprentices have begun training, of whom 464 (94.3%) were white, 23 (4.6%) were black, and 5 (1.01%)

the only non-litigious route by which non-whites gained entry into this industry (App. 50-51); yet at the time of trial, non-white participation was negligible. For whites, on the other hand, participation in the apprenticeship program was not a prerequisite to becoming a journeyman steamfitter; and in fact, the district court found that as of July 19, 1971 less than 25% of the total membership of the A-Branch (at the time of trial) had been at some time enrolled in the program (App. 45). Additionally, between January 1, 1972 and January, 1973 "156 whites were admitted to the A-Branch without completing the apprenticeship program . . ." (App. 50).

The primary selection device utilized by the JAC from 1964 to 1971 in screening applicants for the program was a written examination, which the district court found to be discriminatory and in violation of Title VII (App. 57-58).[10]

Subsequent to the court of appeals' affirmance of the affirmative relief, on June 27, 1975, the district court rendered the back pay opinion at issue in this petition (App. 1-8). The District Judge held only the defendant Union liable for back pay, and held it liable only to non-whites who had the skills of journeyman steamfitters and who could meet

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were Spanish-surnamed. In 1971 (when the last apprentice class was formed), nonwhites constituted approximately 3.9% of the total number of participants in the apprenticeship program. Population statistics from the 1970 census indicate that nonwhites constitute approximately 25.09% to 30.06% of the total population of New York City and Nassau and Suffolk Counties. (App. 56-57).

[10] This finding was based upon the examination's differential impact on non-whites coupled with the JAC's failure to prove the examination valid or job-related (App. 57-58).

certain court imposed qualifications (App. 3). However, the district court denied all back pay in connection with the apprenticeship program. As a result,

1. persons denied admission to the apprenticeship program and employment opportunities as apprentices by the operation of an unlawfully discriminatory test were held ineligible for back pay; and

2. as a consequence the JAC, which adopted and used this test, and the Union and MCA which controlled the JAC, were not held liable for back pay.

The court of appeals affirmed the district court's denial of back pay in connection with the apprenticeship program. In so doing, the author of the opinion for the court of appeals wrote,

> The writer of this opinion would apply the same principles [those applied to journeymen] to those who were victims of discrimination in the apprenticeship program. While their problems of proof might even be greater, individuals should not be precluded from establishing loss of pay by appropriate proof where, as here, admission to the program by test was not job-related. The JAC has kept a record of all persons who applied for the apprenticeship program, and the results obtained by those who took the written test. The writer fails to perceive any reason to distinguish the situation of nonwhites who were discriminatorily denied apprenticeship, or who became indentured apprentices, but who lost wages as a result of illegal employment discrimination, from the situation of nonwhite journeymen who lost wages for the same reason.

See *Pettway* v. *American Cast Iron Pipe Co., supra,* 494 F.2d at 258-59 (persons denied admission to apprenticeship program eligible for back pay). I would read the language of *Sheet Metal Workers, supra,* [EEOC v. Local 638 . . . Local 28, 532 F.2d 821 (2d Cir. 1976)] to apply to individuals seeking backpay as a result of discrimination in the apprenticeship program.

My brothers Mansfield and Gurfein, however, feel quite otherwise. They believe it to be within the proper exercise of the conceded discretion of the district court, *Albemarle, supra,* 422 U.S. at 421-23, to deny as hypothetical any backpay in connection with the apprenticeship program, at least where, as here, there was no purposefully bad motive. In their view, even though would-be nonwhite apprentices were victims of discrimination by the JAC, their injury is too remote, and any damages suffered by them altogether too speculative in the sense of the problem of proof, to permit an award. In this regard my brothers point out that an applicant would have to prove the following essential elements to recover:

That if nondiscriminatory tests for admission to the program had been formulated and administered (which of course, never occurred), the applicant would have passed them;

That he would have progressed satisfactorily through the three- or four-year program to graduation; and

That he would then have obtained employment as a steamfitter.

My brothers emphasize the Supreme Court's recognition in *Albemarle* that "the trial court will often have

the keener appreciation of those facts and circumstances peculiar to particular cases." *Id.* at 421-22. This language, they point out, clearly leaves room for district court discretion, the exercise of which was not abused in this instance, where difficult problems of proof in any event are presented. (App. 20-21).

Reasons for Granting the Writ

I.

The Court of Appeals' Decision Conflicts With Title VII of the Civil Rights Act of 1964, and With the Applicable Decisions of This Court and the Circuit Courts, and If Permitted to Stand Will Adversely Affect Numerous Victims of Employment Discrimination.

The majority decision of the court of appeals is in clear conflict with the applicable decisions of this Court and those of other circuits. To the extent that the decision accepts respondents' purported good faith, or lack of "purposefully bad motive," as a basis for denial of relief, the decision is plainly contrary to the holding in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), not to mention numerous decisions of other circuits (A, *infra*). The majority's wholesale denial of relief on the assumption that the claims of persons discriminatorily denied apprentice employment are "hypothetical" is equally erroneous, as it was based on a view of the burden of proof which has been rejected by this Court and other circuit courts (B, *infra*). Moreover, the court of appeals denied identifiable members

of the class an opportunity to meet even the erroneous burden of proof which it adopted, a result which also conflicts with this Court's decision in *Moody* (C, *infra*).

The decision below would critically undermine the efficacy of the back pay remedy under Title VII. In severely limiting the ability of aggrieved individuals to assert back pay claims, the court of appeals found barriers applicable not only to apprentices,[11] but also to employment positions at virtually all levels. Nothing in the nature of circumstances of apprenticeship distinguishes it in any relevant respect from any other employment for the purpose of assessing wage losses. Although the apprentice is expected to acquire certain knowledge and skills and ultimately to qualify as a journeyman, the apprentice is no less an employee than workers in less formalized situations who are expected or given the opportunity to acquire skills in order to move to higher positions. Upon acceptance into the program, an apprentice is referred to employment and receives wages and benefits in accordance with the collective bargaining agreement.[12]

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[11] Apprenticeship programs account for many hundreds of thousands of jobs in the United States. Bureau of Labor Statistics' figures indicate that at the end of 1973 there were 283,774 apprentices in training. BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS—1975, REFERENCE EDITION, table 55 at 141. Moreover, the United States Civil Rights Commission has found that "deliberate and overt employment discrimination by building trades unions continues," and that such discrimination is furthered by union practices in "apprenticeship requirements." U. S. CIVIL RIGHTS COMMISSION, THE CHALLENGE AHEAD—EQUAL OPPORTUNITY IN REFERRAL UNIONS, 232-233 (May, 1976).

[12] See footnote 8, *supra*.

Indeed, the conclusion of the majority of the court of appeals that the claims in connection with apprenticeship are "hypothetical" is not based on any explicated distinction between apprenticeship and other employment. It rests solely on a misallocation of the burden of proof, which, if correct, would be equally applicable *mutatis mutandis* to any hiring or promotion situation. The rationale adopted by the majority for denial of back pay relief is by its very nature susceptible of general application. If allowed to stand, the decision will preclude not only persons discriminated against in apprenticeship programs but innumerable others from a remedy which this Court has held "should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Company* v. *Moody, supra,* 422 U.S. at 421 (footnote omitted).

A. *The Denial of Back Pay on the Basis of Good Faith Conflicts With the Controlling Decision of This Court*

The district court denied back pay on the grounds that (1) damages suffered by applicants for apprenticeship were "speculative," and (2) considerations of "good faith" [13] on the part of defendants weighed against the award. The court of appeals affirmed on the ground that it was within the district court's discretion "to deny as hypothetical any backpay in connection with the apprenticeship program, at least where, as here, these was no purposefully mad motive." (App. 20-21).

In giving weight to purported "good faith" or absence of "purposefully bad motive" as a basis for denial of back pay, as both lower courts clearly did, the decisions are directly contrary to this Court's ruling in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), which squarely rejected a defense based upon the absence of bad faith:

> If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the 'make whole' purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in 'bad faith.' Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent' for 'Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.' *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 432.

422 U.S. at 422-23 (footnote omitted) (emphasis original)

Thus, the decision of the court of appeals is irreconcilable with the settled law on this issue.[14]

B. *In Finding the Back Pay Claims to Be Hypothetical, The Court of Appeals Adopted an Allocation of the Burden Proof Which Is in Conflict With the Applicable Decision of This Court and Those of the Circuit Courts*

Nothing in the nature of apprenticeship makes an applicant's claim for losses due to discrimination any more "hypothetical" than that of any other applicant for employment.[15] Judge Oakes, dissenting from the decision below, recognized this:

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[13] Although unnecessary to consideration of the issue presented, the district court's finding of good faith was highly dubious. For example, while the court found good faith in respondent JAC's reliance on expert opinion in institution of the written admission tests (App. 4), the expert had in fact warned the JAC of the likely discriminatory impact of the test and its lack of validation (A-404). The record is replete with further evidence, which may account for the court of appeals' recharacterization of the matter as a lack of "purposefully bad motive," although this finding is also questionable.

[14] Lower courts having occasion to consider the back pay issue subsequent to *Moody* have understandably refused to allow good faith or motive to affect liability. *Watkins* v. *Scott Paper Co.,* 530 F.2d 1159 (5th Cir.), *cert. denied,* —— U.S. ——, 97 S. Ct. 163 (1976); *United States* v. *United States Steel Corp.,* 520 F.2d 1043, 1053 (5th Cir. 1975), *cert. denied,* —— U.S. ——, 97 S. Ct. 61 (1976); *United Transportation Workers Local 974* v. *Norfolk & Western Ry.,* 532 F.2d 336, 340 (4th Cir. 1975), *cert. denied,* —— U.S. ——, 96 S. Ct. 1664 (1976); *cf. Rogers* v. *International Paper Co.,* 526 F.2d 722 (8th Cir.), *on remand from the Supreme Court,* 423 U.S. 809 (1975).

[15] Indeed, back pay for those discriminated against by apprenticeship programs has been awarded routinely. See, *e.g., Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211, 258-59 (5th Cir.

The writer fails to perceive any reason to distinguish the situation of nonwhites who were discriminatorily denied apprenticeship, or who became indentured apprentices, but who lost wages as a reuslt of illegal employment discrimination, from the situation of nonwhite journeymen who lost wages for the same reason. *See Pettway* v. *American Cast Iron Pipe Co., supra,* 494 F.2d at 258-59 (persons denied admission to apprenticeship program eligible for backpay). I would read the language of *Sheet Metal Workers, supra* [*EEOC* v. *Local 638 . . . Local 28,* 532 F.2d 821 (2d Cir. 1976)], to apply to individuals seeking backpay as a result of discrimination in the apprenticeship program.

(App. 20).

The two other members of the panel, however, affirmed the denial of back pay as "hypothetical . . . too speculative in the sense of the problem of proof to permit an award" (App. 21), on the basis of the view that:

1974); *EEOC* v. *Local 638 . . . Local 28,* 532 F.2d 821, 832 (2d Cir. 1976).

Calculation of back pay losses for apprentice applicants in this case can be easily accomplished. The JAC has a record of all persons who applied and the results obtained by those who took the written tests (Doc. 24, Appendix A). The district court's decision, to the extent that it affords an opportunity to some journeyman members of the class to prove their back pay claims, properly contemplates that monetary losses be computed on the basis of the average wages of white members of the A branch during the relevant period (App. 8). There is no reason to distinguish the situation of non-whites who were discriminatorily denied apprenticeship or indentured apprentices who lost wages as a result of illegal employment discrimination from the situation of non-white journeymen who lost wages for the same reason. *See Pettway* v. *American Cast Iron Pipe Co., supra,* 494 F.2d at 258-59.

. . . an applicant would have to prove the following essential elements to recover:

That if nondiscriminatory tests for admission to the program had been formulated and administered (which, of course, never occurred), the applicant would have passed them;

That he would have progressed satisfactorily through the three- or four-year program to graduation; and

That he would then have obtained employment as a steamfitter.

(App. 21).

The first of these elements conflicts with *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), by requiring proof not only of the discriminatory impact of a test and its lack of job-relatedness, but also proof that the applicant would have passed a non-discriminatory test.[16] And as a practical matter, acceptance of the first element would preclude all victims of discriminatory tests from receiving back pay except in the rare instance in which a non-discriminatory test is in effect when back pay claims are heard. The second

[16] Not only has the burden been misallocated, it has been erroneously magnified. The would-be apprentice is saddled with a double burden by the court of appeals' decision. First he must show, as all members of the class have already done, that the test was discriminatory under the principles of *Griggs* v. *Duke Power Company,* 401 U.S. 424 (1971). Then, to obtain back pay, he must additionally show that the test was discriminatory as to him because he could have passed a non-discriminatory test. Since this second showing need not be made under *Griggs,* the court of appeals decision disregards the recognized burden of proof on the issue. While *Griggs* dealt with the elements of proof required to enjoin the use of an unlawfully discriminatory test, this Court held in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 423 (1975), that there should be no "categorical distinctions" made between the injunctive and back pay remedies of Title VII.

and third elements reflect an evident and erroneous assumption that apprenticeship is not employment and that wage losses result only at the point when the apprentice would have qualified as a journeyman. These elements of proof place on the members of a class who have already proven discrimination the additional burden of establishing their job performance, progression and employability but for the discrimination.

This Court spoke to this precise issue in *Franks* v. *Bowman Transportation Company,* —— U.S. ——, 96 S.Ct. 1251 (1976). There, in speaking of the burden a claimant must carry in order to sustain a claim for back seniority under Title VII, it was noted,

> It is true of course that obtaining the third category of evidence with which the District Court was concerned —what the individual discriminatee's job performance would have been but for the discrimination—presents great difficulty. *No reason appears, however, why the victim rather than the perpetrator of the illegal act should bear the burden of proof on this issue.*
>
> —— U.S. at ——, 96 S.Ct. at 1268, n.32 (emphasis added).

Therefore once a class has shown a discriminatory denial of employment opportunities, the burden falls upon the discriminators to show that proven class members are individually ineligible for relief.

Accordingly, and in contrast to the court of appeals decision herein, other circuits which have considered the individual's burden of proof after discrimination against the class has been proven require the individual to prove his

membership in the class and the losses suffered.[17] In the instant case, the correct elements would require proof that the individual applied for the apprenticeship program, took and failed the discriminatory tests, was thereby excluded from the program, and consequently had less earnings in the interim than apprentices.[18] Once such a showing is made, any reason for denial of back pay to any class member should be the burden of the discriminating party. This is the position of all other circuits which have considered the matter. Thus, other circuits hold that "[o]nce it has been shown . . . that an employer was discriminating against a class of employees, the employer must shoulder the burden of persuasion to show that a particular employee was unqualified for a position in an all-white line of progression." *Watkins* v. *Scott Paper Company,* 530 F.2d 1159, 1177 (5th Cir.), *cert. denied,* —— U.S. ——, 97 S.Ct. 163 (1976). *Accord*: *Day* v. *Matthews,* 530 F.2d 1083, 1085, 1086 (D.C. Cir. 1976) (After a showing of discrimination, back pay can only be denied upon *employer's* proof "by clear and convincing evidence . . . that the employee . . . would not have gotten the post in any event," and that the

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[17] *See Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211, 259-260 (5th Cir. 1974) *relying upon Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F.2d 1364, 1379 (5th Cir. 1974); *Mims* v. *Wilson,* 514 F.2d 106, 110 (5th Cir. 1975); *United Transportation Union Local 974* v. *Norfolk & Western Ry.,* 532 F.2d 336, 341 (4th Cir. 1975), *cert. denied,* —— U.S. ——, 96 S.Ct. 1664 (1976); *cf. Day* v. *Matthews,* 530 F.2d 1083, 1085-86 (D.C. Cir. 1976).

[18] For a discussion of how back pay computations can be made once eligibility is proven in cases such as the one at bar, see *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211, 260-63 (5th Cir. 1974); *United States* v. *United States Steel Corp.,* 520 F.2d 1043, 1055-57 (5th Cir. 1975), *cert. denied,* —— U.S. ——, 97 S.Ct. 61 (1976).

employer must be "held to a strict showing," with "any resulting uncertainty [to] be resolved against the party whose action gave rise to the problem."); *Mims* v. *Wilson,* 514 F.2d 106, 110 (5th Cir. 1975); *Pettway* v. *American Cast Iron Pipe Company, supra,* 494 F.2d at 259-60; *United Transportation Union Local 974* v. *Norfolk & Western Ry.,* 532 F.2d 336, 341 (4th Cir. 1975), *cert. denied,* —— U.S. ——, 96 S.Ct. 1664 (1976); *Ellison* v. *Rock Hill Printing & Finishing Company,* 64 F.R.D. 415, 418-19, n. 5 (D.S.C. 1974).[19]

Thus, the holding below misallocates the burden of proof and cannot be reconciled with the applicable decisions of this Court and those of the circuits.

[19] Similarly other circuits recognize that in computing back pay "unrealistic exactitude is not required," and uncertainties in the computation" should be resolved against the discriminating employer." *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211, 260-61 (5th Cir. 1974). *Accord*: *Hairston* v. *McLean Trucking Co.,* 520 F.2d 226, 232-33 (4th Cir. 1975) (court rejected employer's defense that back pay claims were not capable of precise measurement, noting "the computation of individual awards necessarily involves speculation"); *Meadows* v. *Ford Motor Co.,* 510 F.2d 939, 948 (6th Cir. 1975), *cert. denied,* —— U.S. ——, 96 S.Ct. 2215 (1976) (held that a policy prohibiting back pay because of difficulty computing it "would encourage employers who had the inclination to disregard this act to do so with impunity . . . ."); *United States* v. *United States Steel Corp.,* 520 F.2d 1043, 1053 (5th Cir. 1975), *cert. denied,* —— U.S. ——, 97 S.Ct. 61 (1976) (held problems of individual proof not to preclude discriminatees from asserting back pay claims "one-by-one.") *cf. United States* v. *Hazelwood School District,* 534 F.2d 805, 820-21, n. 11 (8th Cir.), *petition for cert. filed,* 45 U.S.L.W. 3210 (U.S. Sept. 28, 1976) (district court instructed by Court of Appeals to undertake individual determination of back pay claims of rejected applicants).

C. *The Denial to Members of the Class of Any Opportunity to Prove Back Pay Claims Conflicts With the Principles of the Applicable Decision of This Court and Those of the Circuit Courts*

Having incorrectly allocated the burden of proof, the court of appeals compounded its error by foreclosing class members from the opportunity to carry this burden. The erroneous result, as in *Moody,*[20] is that the back pay question is automatically resolved against a whole class of injured persons, some of whom could no doubt carry even the erroneous burden posited below.

If the lower court's reasons for complete denial of relief to this segment of the class were applied generally, there can be no doubt that the result would "frustrate the central statutory purposes" of Title VII. 422 U.S. at 421. That statutory purpose was clearly set forth by a Conference Committee of the Senate and House in 1972:

> The provisions of this subsection [706(g)] are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of *the Act is intended to make the victims of unlawful discrimination whole,* and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that *persons aggrieved by the consequences and effects of the unlaw-*

[20] As this Court noted in *Moody,*

> Though at least some of the members of the plaintiff class obviously suffered a loss of wage opportunities on account of Albemarle's unlawfully discriminatory system of job seniority, the District Court decided that *no* backpay should be awarded to *anyone* in the class. 422 U.S. at 413 (emphasis original).

ful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. 118 Cong. Rec. 7168 (1972). (emphasis added)

Therefore the exclusion of a whole class of proven victims of discrimination from any opportunity whatever to prove back pay claims on the grounds of good faith or speculativeness conflicts with the purpose of Title VII, and with *Moody*. It is also irreconcilable with the decisions of other circuits. As the Fifth Circuit has held, members of a class against which discrimination has been shown are entitled to an opportunity, "one-by-one, to present personal claims for back pay." *United States* v. *United States Steel Corp.*, 520 F.2d 1043, 1053 (5th Cir. 1975), *cert. denied*, —— U.S. ——, 97 S.Ct. 61 (1976).

II.

The Lower Court Erred in Failing to Hold the JAC, the Union and MCA Liable for Back Pay.

The question of back pay in connection with the apprenticeship program, if resolved in favor of the members of the class unlawfully denied apprentice employment, necessarily carries with it the issue of the liability of the various respondents. The Union, JAC and MCA are jointly liable for discrimination in the apprenticeship program, a factual question on which there is a full record but which neither lower court had occasion to reach.[21] Petitioners recognize

[21] The court of appeals' holding that neither the MCA nor the JAC were liable for losses suffered by non-whites with journeyman skills who were unlawfully denied admission to the A Branch of the Union (App. 22-25) should not be confused with the question of liability for the apprenticeship program.

that should the writ be granted and the judgment below be reversed as to entitlement of the members of the class to establish their claims for back pay, the issue of liability of the various respondents could also be determined by the lower court upon remand.

CONCLUSION

For the foregoing reasons the Court should grant a Writ of Certiorari to review the judgment and opinion of the court of appeals.

Respectfully submitted,

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APPENDIX

Opinion of Bonsal, *U.S.D.J.*,
Dated June 27, 1975

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

June 27, 1975.

Nos. 71 Civ. 847, 71 Civ. 2877.

GEORGE RIOS *et al.*,

Plaintiffs,

v.

ENTERPRISE ASSOCIATION STEAMFITTERS
LOCAL 638 OF U.A. *et al.*,

Defendants.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

ENTERPRISE ASSOCIATION STEAMFITTERS
LOCAL 638 OF U.A. *et al.*,

Defendants.

BONSAL, *District Judge.*

The plaintiffs in *Rios v. Enterprise Association Steamfitters Local 638 of U.A.*, 400 F.Supp. 983, move for back pay for members of the plaintiff classes.

This motion arises from a protracted litigation under Title VII of the Civil Rights Act of 1964, as amended. *See Rios v. Enterprise Association Steamfitters, Local 638 of U.A.*, 400 F.Supp. 981 (S.D.N.Y.1975); *United States v. Local 638, Enterprise Association of Steam, etc.*, 360 F. Supp. 979 (S.D.N.Y.1973), *aff'd but remanded in part*, 501 F.2d 622 (2d Cir. 1974); *United States v. Local 638, etc.*, 337 F.Supp. 217 (S.D.N.Y.1972); *Rios v. Enterprise Association Steamfitters Local Union No. 638 of U.A.*, 326 F.Supp. 198 (S.D.N.Y.1971); *Rios v. Enterprise Association Steamfitters Local Union #638 of U.A.*, 54 F.R.D. 234 (S.D.N.Y.1971).

Plaintiffs seek an award of back pay for the members of the class they represent.[1] Specifically, plaintiffs seek back pay for (1) non-white A Branch[2] members who, though qualified were denied jobs as a result of the discriminatory work referral practices fostered by defendants; (2) non-white members of the B Branch who were not admitted to

[1] The classes are defined as: (a) "all Negro and Spanish Surnamed Americans residing in New York City and the Counties of Suffolk and Nassau in the State of New York now or at any time in the future who have the skills necessary to work as journeymen steamfitters" and (b) "all Negro and Spanish Sur-named Americans residing in New York City and the Counties of Suffolk and Nassau in the State of New York now or at any time in the future who are capable of learning such skills and who wish to obtain access to steamfitting work in New York City and said Counties." *Rios* v. *Enterprise Association Steamfitters Local Union #638 of U.A.*, 54 F.R.D. 234, 237 (S.D.N.Y.1971) (Tenney, J.).

[2] A Branch members of Local 638 do mainly construction work, have greater job security, earn higher hourly pay and have greater opportunity for advancement than the members of the B Branch of Local 638, whose members work in shops and do repair work. Being a member of the A Branch is a substantial aid in obtaining a job as a construction steamfitter in the territorial jurisdiction of Local 638, *i. e.*, New York County, The Bronx, Kings, Queens, Richmond, Nassau and Suffolk counties. *United States* v. *Local 638, etc.*, 360 F.Supp. at 984–85.

the A Branch; (3) other persons qualified to be A Branch members who were either denied membership in the A Branch or were discouraged from applying for membership or from seeking employment in the steamfitting industry; (4) persons who, with on-the-job training, were capable of learning the skills necessary to be a journeyman steamfitter; and (5) unskilled persons who were denied admission to the apprenticeship program, or who, once admitted, dropped out, or who were deterred from applying to the apprenticeship program because of defendants' discriminatory policies and tests.

Plaintiff's motion is granted to the extent that back pay will be awarded to qualified members of the plaintiff class who applied in writing for membership in the A Branch and who were discriminatorily denied admission after October 15, 1968.[3]

Back pay for others for whom it is sought will be denied since (1) damages, if any, arising from alleged discriminatory work referral practices are not ascertainable since Local 638 had no hiring hall and there are no accurate records of job openings for the period involved; (2) damages to persons who did not make formal written application to the A Branch are hypothetical; and (3) damages suffered as a

[3] *See* discussion of the applicable statute of limitations, *infra*. *United States* v. *Wood, Wire and Metal Lathers International Union, Local Union 46*, 328 F.Supp. 429 (S.D.N.Y.1971), which granted back pay to a broader group of plaintiffs than this Court finds appropriate, is distinguishable. *Wood, Wire* involved a contempt proceeding in connection with a Title VII action, which proceeding arose because the defendant union had repeatedly violated the parties' consent decree, and this procedural context was significant to the Court's determination. Also, in *Wood, Wire* the union continuously operated a hiring hall which was contemplated in devising the consent decree and the back pay remedy for its violation. Finally, the period for which back pay was awarded was less than nine months.

result of the apprenticeship program are speculative, and equitable considerations weigh against making these back pay awards since the admission tests used by defendants were registered with the United States and New York State Departments of Labor and were adopted by defendants in good faith on the recommendation of experts.

The Applicable Standard

Title VII provides in pertinent part:

> "If the Court finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . ., the court may enjoin the respondent . . . and order such affirmative action as may be appropriate, which may include . . . reinstatement or hiring of employees, with or without back pay (payable by the [party] responsible for the unlawful employment practice). . . ." 42 U.S.C. § 2000e-5(g).

Thus, the statute grants wide discretion to award back pay when warranted by the circumstances of the case and a court must make such determinations on a case-by-case basis. *See, e. g., Albemarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *Kober v. Westinghouse Electric Corp.,* 480 F.2d 240 (3d Cir. 1973); *Manning v. International Union,* 466 F.2d 812 (6th Cir. 1972), *cert. denied,* 410 U.S. 946, 93 S.Ct. 1366, 35 L.Ed.2d 613 (1973); *Schaeffer v. San Diego Yellow Cabs, Inc.,* 462 F.2d 1002, 1006 (9th Cir. 1972); *LeBlanc v. Southern Bell Telephone & Telegraph Co.,* 460 F.2d 1228 (5th Cir.), *cert. denied,* 409 U.S. 990, 93 S.Ct. 320, 34 L.Ed.2d 257 (1972). Cases which hold that an award of back pay is required by Title VII "unless special circumstances would render such an award

unjust" also require a case-by-case analysis. *See Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211, 251-53 (5th Cir. 1974); *Johnson v. Goodyear Tire & Rubber Co.,* 491 F.2d 1364, 1374-77 (5th Cir. 1974); *Head v. Timken Roller Bearing Co.,* 486 F.2d 870 (6th Cir. 1973); *Bowe v. Colgate-Palmolive Co.,* 416 F.2d 711 (7th Cir. 1969).

In making awards for back pay, all the circumstances of the case, including ability to pay, must be taken into account. *See Thornton v. East Texas Motor Freight,* 497 F.2d 416, 421-422 (6th Cir. 1974); *United States v. Georgia Power Co.,* 474 F.2d 906, 919-22 (5th Cir. 1973). *See also Laffey v. Northwest Airlines, Inc.,* 374 F.Supp. 1382 (D.D.C.1974).

Local 638.—Local 638 was not an employer, nor was it conducting a business for profit. Local 638 is an association of workers united for their mutual protection, which is supported by dues and other assessments collected from its members to cover expenses and, from time to time, to support a strike fund. Financial data submitted by Local 638 indicates that it has limited financial resources.

Back pay is compensation for "tangible economic loss" to be paid by parties responsible for that loss (*see, e.g., Johnson v. Goodyear Tire & Rubber Co., supra* at 1381-82; *Robinson v. Lorillard Corp.,* 444 F.2d 791 (4th Cir. 1971); 42 U.S.C. § 2000e-5(g)). Since it was found at the trial that Local 638 engaged in a pattern and practice of discrimination against members of the plaintiff class, it is liable to provide back pay in cases of such discrimination. 360 F.Supp. at 989.

MCA.—Plaintiffs seek to have MCA share in the burden of providing back pay. MCA, a trade association of certain contractors in the New York area, acts only in collective

bargaining negotiations between its members and Local 638. MCA does not employ steamfitters; rather, employment is done by its members. While MCA was found to have been properly made a party defendent in the *Rios* action (360 F.Supp. at 994-95), that finding did not imply that MCA was "responsible *ipso facto* for all the employment practices here found unlawfully discriminatory or . . . liable in damages to the plaintiffs in Rios. Plaintiffs have shown no specific instances of MCA discrimination. Rather, plaintiffs have demonstrated only that there has been a lack of nonwhite employment in the industry generally and that, in consequence, the industry's referral practices must be changed." *Id.* at 995-96.

JAC.—JAC, a joint labor-management committee composed of four members chosen by MCA and four members chosen by Local 638, has conducted the steamfitters' apprenticeship program throughout the years relevant to the actions at bar. However, JAC has "no" demonstrated responsibility for direct admissions to the A Branch of Local 638 of persons already qualified as journeymen steamfitters.

Therefore, only Local 638 is liable for back pay.[4]

Period of Back Pay

As to the period for which back pay may be recoverable, Title VII does not provide a statute of limitations in actions such as the instant case which were determined by the EEOC before March 24, 1972. However, on March 24, 1972,

[4] The decision herein is without prejudice to any claim a member of the plaintiff class may have against an employer (*see Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). Neither MCA nor JAC is an employer, and no employers are parties to this action.

Title VII was amended by Congress to provide that as to all cases pending before the EEOC on that date or filed thereafter, back pay liability accrues from a date no more than two years prior to the filing of the charge with the EEOC. Pub.L. 92-261, §§ 4(a), 14, codified at 42 U.S.C. § 2000e-5(g). While the case here was determined by the EEOC prior to March 24, 1972, this amendment has a bearing on Congressional intent as to the limitation to be imposed in granting back pay awards, and will be applied here. A person entitled to back pay may recover proven damages beginning on the date the discrimination occurred or beginning on October 15, 1968, which is two years prior to the filing of the complaint with EEOC by the *Rios* plaintiffs, whichever date is later. *See Laffey v. Northwest Airlines, Inc., supra* at 1390.

The termination date for computation of back pay awards is June 21, 1973, the date of this Court's order granting a permanent injunction. *See Johnson v. Goodyear Tire & Rubber Co., supra* at 1379.

Plan for Awarding Back Pay

A claimant is entitled to compensation for wages lost if he files his claim on or before December 31, 1975 and proves the following:

(1) He applied in writing for membership in Local 638's A Branch.

(2) He was discriminatorily denied admission to the A Branch after October 15, 1968. Discrimination as to a claimant for purposes of back pay will commence on the date on which the next applicant for membership in the A Branch who does not qualify as a member of the plaintiff class was admitted to the A Branch. This dis-

crimination for purposes of back pay awards will be deemed to continue until the date claimant was admitted to the A Branch or until June 21, 1973, whichever is earlier.

(3) At the time of his application, the claimant resided in a county within the jurisdiction of Local 638, and was qualified for admission under the standards used in the implementation of this Court's Order of June 21, 1973.

(4) The claimant proves monetary damages resulting from his denial of admission to the A Branch, less any other employment income or public assistance. Monetary damages will be computed on the basis of the average monthly wage paid to members who were admitted to the A Branch on or after October 15, 1968.

Payment by Local 638 of back pay will be made after determination of all claims. At that time, upon application of Local 638, for good cause shown, the Court will review the aggregate liability for back pay awards and its impact on the financial resources of the Union, and the Court may in its discretion make a *pro rata* reduction of each claimant's award or provide for payments in installments.

The plaintiffs, the EEOC and Local 638 are invited to suggest methods to efficiently administer this plan for making back pay awards.

Settle order on notice.

Opinion and Judgment of the United States Court of Appeals for the Second Circuit Dated September 7, 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 976, 975, 1286-89—September Term, 1975.

(Argued June 16, 1976 Decided September 7, 1976).

Docket Nos. 75-6132, 75-6140, 75-7646, 75-7668, 75-6999, 76-7011

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Appellants,

v.

ENTERPRISE ASSOCIATION STEAMFITTERS Local No. 638 of U.A., *et al.*,
Appellees.

GEORGE RIOS, *et al.*,
Appellants

v.

ENTERPRISE ASSOCIATION STEAMFITTERS Local No. 638 of U.A., *et al.*,
Appellees.

Before:

MANSFIELD, OAKES AND GURFEIN,
Circuit Judges

Cross appeals certified under 28 U.S.C. §1292(b) from backpay and attorneys' fees orders issued in an employment discrimination case by the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge*. The district court held the union to be solely liable for backpay awarded to limited classes

of private plaintiffs and attorneys' fees to public interest law firm.

Order as to backpay affirmed in part and reversed in part; order as to attorneys' fees affirmed.

LOUIS G. CORSI, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Steven J. Glassman, Assistant United States Attorney, Abner W. Sibal, General Counsel, EEOC, Joseph T. Eddins, Associate General Counsel, EEOC, Beatrice Rosenberg, Attorney, EEOC of counsel), for Appellant EEOC.

DENNIS R. YEAGER, National Employment Law Project, Inc., New York, N.Y. (Marilyn P. Walter and Robert P. Roberts, National employment Law Project, Inc., Tufo, Johnston & Allegaert, New York, N.Y., of counsel), for Appellants Rios,*et al.*

RICHARD BROOK, Delson & Gordon, New York, N.Y., for Appellee Local 638.

THOMAS A. SHAW, JR., Breed, Abbott & Morgan, New York, N.Y. (Robert B. Kuhback, Breed, Abbott & Morgan, New York, N.Y., of counsel), for Appellee Mechanical Contractors Association of New York, Inc.

OAKES, *Circuit Judge:*

Cross appeals, challenging backpay and attorney's fees orders in a case involving unlawful discrimination in

union membership and related employment, raise a congeries of questions relating to remedial relief under Title VII of the Civil Rights Act of 1964. The underlying question of discrimination has been a matter of protracted litigation,[1] with quite careful consideration given to the issues by a district judge whose exercise of remedial discretion[2] we are, needless to say, reluctant to reverse. Separate actions brought by the Government and by individual plaintiffs ("the *Rios* plaintiffs") against Enterprise Association Steamfitters Local 638 of U.A. (hereinafter "Local 638" or "the union"), the Joint Steamfitters Apprenticeship Committee of the Steamfitters Industry (JAC), and the Mechanical Contractors Association of New York, Inc. (MCA), have been consolidated for the trial below, and for these appeals. The orders appealed from were entered in the United States District Court for the Southern District of New York by Dudley B. Bonsal, *Judge. See* 400 F. Supp. 988 (S.D.N.Y. 1975) (backpay); 400 F. Supp. 993 (S.D.N.Y. 1975) (attorneys' fees). A previous order of the district court providing injunctive relief has been separately reviewed in this

1. *See Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 400 F. Supp. 983 (S.D.N.Y. 1975); *United States* v. *Local 638, Enterprise Ass'n of Steamfitters*, 360 F. Supp. 979 (S.D.N.Y. 1973), *aff'd but remanded in part*, 501 F.2d 622 (2d Cir. 1974); *United States* v. *Local 638*, 337 F. Supp. 217 (S.D.N.Y. 1972); *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 326 F. Supp. 198 (S.D.N.Y. 1971); *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 54 F.R.D. 234 (S.D.N.Y. 1971). *See also Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 520 F.2d 352 (2d Cir. 1975) (denying post judgment intervention on part of certain B Branch members, note 4 *infra*).

2. A discretion which, however, must be "measured against the purposes which inform Title VII," including "the purpose . . . to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417, 418 (1975). The *Albemarle* Court would have the court of appeals "maintain a consistent and principled application of the backpay provision consonent with the twin statutory objectives [of eradicating discrimination and making the victims of discrimination whole] . . . " 422 U.S. at 421.

court; the attorneys' fees and backpay issues were reserved at that time. *United States* v. *Local 638, Enterprise Association of Steamfitters*, 360 F. Supp. 979 (S.D.N.Y. 1973), *aff'd but remanded in part*, 501 F.2d 622 (2d Cir. 1974), *modified on remand sub nom. Rios* v. *Enterprise Association Steamfitters Local 638*, 400 F. Supp. 983 (S.D.N.Y. 1975). Appeal from the present orders is taken by way of certification under 28 U.S.C. §1291 (b).[3] Since appeal has not been taken from any of the district court's findings on discrimination, *see* 501 F.2d at 627, the only questions we have here, and they are several, relate to remedial relief.

I. BACKPAY

The district court's assorted holdings in respect to backpay may be summarized as follows. First, backpay was to be awarded to qualified members who applied in writing for membership in A Branch[4] of Local 638, and were denied admission after October 15, 1968, but before June 21, 1973, the date of the order granting injunctive relief. *See* 400 F. Supp. at 992. The district court's reasoning for denying backpay to others was that damages arising from discriminatory work referral practices are not ascertainable since Local 638 had no hiring hall and there are no accurate records of job openings for the period involved; damages to individuals who did not make formal written application to the A Branch are "hypothetical"; damages suffered as a result of the administration of the apprenticeship program are "speculative"; and equitable considerations weigh against broader relief since the admission test to the apprenticeship program was registered with the United States and New York State Departments of Labor and was adopted by the defendants in good faith on the recommendation of experts. *Id.* at 991.[5]

3. *See also* Fed. R. App. P. 5.

4. The A Branch is the construction branch of the union. Its members have the status of journeymen and do mainly construction work. The metal trades or B Branch members generally work in shops and do repair work. *But see Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 520 F.2d 352, 354 (2d Cir. 1975). A Branch members receive higher hourly rates of pay. Membership in the A Branch is a substantial aid in obtaining a job as a construction steamfitter, is a prerequisite to certain job security and is of assistance in terms of advancement and overtime pay. 360 F. Supp. at 984-85.

Second, while ability to pay is an equitable factor to be taken into account in awarding backpay under Title VII, and the union in this case has only limited financial resources, the court concluded that the union is nevertheless liable. *Id.* at 991-92. In light of the union's financial situation, however, the court reserved the right to make a pro rata reduction of each claimant's award, or to provide for payments in installments, after the court has reviewed the total impact of the backpay orders. *Id.* at 993.

Third, the MCA is not responsible for all of the unlawful or discriminatory practices—indeed, there has been no specific MCA discrimination shown, the only showing being that there has been a lack of nonwhite employment in the industry generally with the result that industry referral practices must be changed. *Id.* at 992. MCA was, therefore, found not liable for backpay.

Fourth, the district court held that the JAC, a joint committee composed of four members chosen by MCA and four members chosen by Local 638 which has conducted the Steamfitters Apprenticeship Program throughout the years, had no "demonstrated responsibility for direct admissions to the A Branch of Local 638 of persons already qualified as journeymen steamfitters." *Id.* Thus it

5. It is to be noted that two days before the district court's decision the Supreme Court held that "good faith" is "not sufficient reason for denying backpay," and that "the mere absence of bad faith simply opens the door to equity; it does not depress the scale in the employer's favor." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 422 (1975).

too was found not liable. *Id.*

Fifth, the court adopted the two-year statute of limitations which was set forth in Pub. L. No. 92-261, §4(a) (Mar. 24, 1972), 14; *see* 42 U.S.C. §2000e-5 (g), a statue enacted *after* the suit was brought and its classes defined.[6] The court also limited forward recovery of backpay to the period predating the court's order granting a permanent injunction against the unlawful discriminatory practices. 400 F. Supp. at 992. *See Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 258 (5th Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1379 (5th Cir. 1974).

Sixth, the court limited backpay recovery to residents of a county within the geographical jurisdiction of Local 638 at the time of their application for membership in the Local 638 A Branch.[7] 400 F. Supp. at 993.

And seventh, the court ordered that income from other employment or from public assistance is to be deducted from any backpay award. *Id.*

The EEOC and the *Rios* plaintiffs claim that in each of the above respects the district court's order was too narrowly drawn to accord with the dictates of *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), and courts of appeals precedents. Local 638 argues on cross-appeal that the district court abused its discretion in ordering a

6. The classes defined by Judge Tenney were two: (A) all nonwhites residing in New York City and the Counties of Suffolk and Nassau in the State of New York who now or at any time in the future have the skills necessary to work as journeymen steamfitters; and (B) all nonwhites residing in New York City and the Counties of Suffolk and Nassau in the State of New York who now or at any time in the future are capable of learning such skills and who wish to obtain access to steamfitting work in New York City and said counties. See memorandum filed in *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 71 Civ. 847 (S.D.N.Y. Aug. 10, 1971) (Tenney, J.).

7. That includes the five New York City counties, as well as Nassau and Suffolk.

backpay award against a union defendant in a Title VII suit. The union claims that the effect of the backpay award will be to bankrupt it, thereby destroying the affirmative relief granted and frustrating the policy of the Act. The union also points to the lack of evidence that it had engaged in purposeful discrimination against nonwhites in connection with work referrals, *see* 360 F. Supp. at 990. We will consider first the union's claim on the cross-appeal, and then the issues raised by the appellants.

A. *Liability of Union for Backpay.* We agree with the Government and the *Rios* plaintiffs that the union's arguments against a backpay award amount to a claim for special treatment for unions and special immunity for the discriminatory practices in which they engage. This claim has no support in equity or law. The statue, which refers to "back pay (payable by the employer, employment agency, or labor organization, as the case my be, responsible for the unlawful employment practice) ...," 42 U.S.C. §2000e-5 (g), is directly to the contrary, To be sure, *Albemarle, supra,* did approve a backpay award against an employer rather than a union. But the Court quoted an employer rather than a union. But the Court quoted with evident approval from *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973), stating that "[i]t is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers *and unions* to self-examine and toself-evaluatetheir employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'" *Albemarle, supra,* 422 U.S. at 417-18 (emphasis added). In the parallel sheet-metal-construction-workers' case, *EEOC* v. *Local 638 . . . Local 28 of the Sheet Metal Workers' International Association*, 532 F.2d 821 (2d Cir. 1976) [hereinafter *Sheet Metal Workers*], backpay awards against the union (as

well as against a joint apprenticeship committee) were upheld, the court taking into account the language of *Albemarle, supra*, that "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle, supra*, 422 U.S. at 421, *quoted in Sheet Metal Workers, supra*. 532 F.2d at 832. Since in many instances it may well be that union, rather than employer, discrimination is the prime factor resulting in the evil proscribed under Title VII, any broad rule that unions are exempt from the equitable backpay award could well "frustrate the central statutory purposes" of the Act, as those are defined in the *Albemarle* opinion.

The union, however, makes the special claim that it should be exempted from the backpay award issued in this case because the amount of the award is potentially so large that the union may be driven into bankruptcy, thereby destroying its capabilities to provide relief for its new minority members. This claim of financial exigency seems premature at this stage. It is by no means apparent that the backpay award will wreak the disastrous consequences and summon forth the parade of horrors that the union envisages. The record lacks any evidence showing that the union faces imminent financial distress should backpay be awarded; any evidence on this issue the district court may consider prior to its entry of a final backpay order. Therefore we do not now pass upon the priority of any reduction, either under the law or the facts as they may be developed. Indeed, it may not be amiss to point out that the union and its pre-1968 membership have financially benefited from its policy of excluding

minority applicants from access to employment opportunities which the union has historically controlled. It is, therefore, no abuse of discretion to require relief for appellees which may, if only indirectly, adversely affect the interests of other union members. *See Franks* v. *Bowman Transportation Co.*, 44 U.S.L.W. 4356, 4364 (U.S. Mar. 24, 1976) (retroactive seniority); *Patterson* v. *Newspaper & Mail Deliverers' Union of New York and Vicinity*, 514 F.2d 767, 775 (2d Cir. 1975).

Ample authority exists in other circuits for the award of backpay against unions for Title VII violations, either solely, where the union was primarily responsible, *Guerra* v. *Manchester Terminal Corp.*, 498 F.2d 641, 655-56 (5th Cir. 1974), or against unions and employers jointly, where responsibility for the discrimination is shared, *e.g.*, *Waters* v. *Wisconsin Steel Workers of International Harvester Co.*, 502 F.2d 1309, 1321 (7th Cir. 1974), *cert.denied*, 44 U.S.L.W. 3664 (U.S. May 25, 1976). *See also UTU, Local 974* v. *Norfolk & Western Railway Co.*, 532 F.2d 336 (4th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3592 (U.S. Apr. 20, 1976). The practice is the same under the National Labor Relations Act in cases where a union has caused an employer to discriminate against non-union or nonconforming union employees. *See Radio Officers Union* v. *NLRB*, 347 U.S. 17 (1954). The NLRA example was thought to be the strongest analogy to the Title VII situation by the Supreme Court in *Albemarle, supra*, 422 U.S. at 419. That opinion points out that the legislative history of the Title VII backpay provision states that it was "expressly modeled" on the NLRA backpay provision. *Id.*

B. *Limitation of Relief to Persons Applying In Writing to Branch A for Membership.* The *Rios* plaintiffs and the EEOC challenge this portion of the district court's order on two bases—first, that the limitation to those who can

prove they applied *in writing* for membership is invalid as too restrictive as to those who have applied, and, second, that many of the people discriminated against, but who never actually applied for union membership, will be precluded from recovery. The first issue raised is easy to resolve, the second more difficult.

Judge Bonsal's order denies backpay to persons who do not possess written evidence of their application for union membership. His order was handed down prior to this court's decision in *Sheet Metal Workers*, *supra*, which in reliance on *Albemarle*, *supra*, disapproved a similar order in the sheet-metal-workers' case. As the court said in *Sheet Metal Workers*, limiting backpay to those who apply in writing or can provide documentary proof would serve to "frustrate the central statutory purposes" of Title VII, especially since one reason that there may be no documentary proof is that the Local and the Joint Apprenticeship Council there, as here, kept incomplete records of their membership applications. 532 F.2d at 832. "To deny back pay to persons who, as a result of the *union's* actions, have no written proof is to reward the union and the JAC for their record-keeping failures." *Id.* (emphasis original). Thus the order of the district court in this respect must be reversed. Testimonial evidence may be received as in any other litigation, so that victims of discrimination in admission to journeyman membership in the A Branch of the union, who actually applied therefor, may recover whether or not they made formal written application.

Appellants' second claim is that specific classes of persons who may be able to present evidence of individual discrimination are excluded from recovery by the district court's backpay order. The court's order limits recovery to those who applied for A Branch membership. Two other very significant groups are excluded by this order: those who were discriminatorily denied work referrals both

before and after they were finally admitted to the A Branch, 360 F. Supp. at 990-91, and those who failed discriminatory apprentice entrance exams and therefore did not make membership application, *id.* at 991-92.

We are agreed that the force of *Albemarle* and other Title VII case law requires that any nonwhite steamfitter, whether a union member or not, who claims that he was discriminated against by work referral practices is entitled to prove the discrimination against him and any resulting damages.[9] Presumably he would have to show that despite his efforts to find work with a contractor or with a steamfitting subcontractor he was turned down. He would also have to show that the union referred only white union members, "permit men"[8] or B Branch men to the jobs the nonwhite steamfitter sought, which were filled by those referred. There will be, obviously, difficult problems of proof for any individual plaintiff, but we see no valid reason for precluding these persons from attempting to produce such proof. As the Fourth Circuit said in *Hairston* v. *McLean Trucking Co.*, 520 F.2d 226 (4th Cir. 1975), "'unrealistic exactitude is not required' in back pay determinations. . . . "Id. at 233. Similarly, "uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating [party]." Id. See also *United States* v. *United States Steel Corp.*, 520 F.2d 1043, 1058

8. "Permit men" are those who work with union "permits," often relatives and friends of union members.

9. By artificially limiting the number of qualified union members, the union placed itself in a stronger bargaining position for wage increases in its negotiations with the contractors. Thus, while the union members economically benefited from the discrimination (not only in possible higher hourly rates or access to overtime pay, but also in the restriction of steamfitter employment to "white only"), the contractor members of the MCA were no better off and may well have had to pay higher wages than they would have in a freer labor market. The JAC is not shown to have received any economic benefit from the discrimination.

(5th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3649 (U.S. May 18, 1976); *Pettway* v. *American Cast Iron Pipe Co.*, *supra*, 494 F.2d at 260-61; *Johnson* v. *Goodyear Tire & Rubber Co.*, *supra*, 491 F.2d at 1380 n.53. We agree with the EEOC and the private appellants that good faith is not a defense in a Title VII case, and that such a defense is equally inapplicable to claims for backpay as well as other relief. *Albemarle*, *supra*, 422 U.S. at 422-23; *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971). *See also Washington* v. *Davis*, 44 U.S.L.W. 4789, 4794 (U.S. June 7, 1976).

The writer of this opinion would apply the same principles to those who were victims of discrimination in the apprenticeship program. While their problems of proof might even be greater, individuals should not be precluded from establishing loss of pay by appropriate proof where, as here, admission to the program by test was not job-related. The JAC has kept a record of all persons who applied for the apprenticeship program, and the results obtained by those who took the written test. The writer fails to perceive any reason to distinguish the situation of nonwhites who were discriminatorily denied apprenticeship, or who became indentured apprentices, but who lost wages as a result of illegal employment discrimination, from the situation of nonwhite journeymen who lost wages for the same reason. *See Pettway* v. *American Cast Iron Pipe Co.*, *supra*, 494 F.2d at 258-59 (persons denied admission to apprenticeship program eligible for backpay. I would read the language of *Sheet Metal Workers*, *supra*, to apply to individuals seeking backpay as a result of discrimination in the apprenticeship program.

My brothers Mansfield and Gurfein, however, feel quite otherwise. They believe it to be within the proper exercise of the conceded discretion of the district court, *Albemarle*, *supra*, 422 U.S. at 421-23, to deny as hypothetical any backpay in connection with the apprenticeship program, at least where, as here, there was no purposefully bad motive. In their view, even though would-be nonwhite apprentices were victims of discrimination by the JAC, their injury is too remote, and any damages suffered by them altogether too speculative in the sense of the problem of proof, to permit an award. In this regard my brothers point out that an applicant would have to prove the following essential elements to recover:

That if nondiscriminatory tests for admission to the program had been formulated and administered (which, of course, never occurred), the applicant would have passed them;

That he would have progressed satisfactorily through the three- or four-year program to graduation; and

That he would then have obtained employment as a steamfitter.

My brothers emphasize the Supreme Court's recognition in *Albemarle* that "the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases." Id. at 421-22. This language, they point out, clearly leaves room for district court discretion, the exercise of which was not abused in this instance, where difficult problems of proof in any event are presented.

We are all agreed that those who were deterred from applying to the A Branch but who were not discriminated against in work referral practices should be denied recovery. It is one thing to grant retroactive or constructive seniority to discriminatees deterred from applying for jobs or promotions, as in *Acha* v. *Beame*, 531 F.2d 648 (2d Cir. 1976), or in *Chance* v. *Board of Examiners*, Nos. 75-7161, -7164 (2d Cir. Jan. 19, 1976), slip op. 6757 (on petition for rehearing). It is another thing to grant back-

pay to those who never applied for a job because they thought it was useless to do so. As pointed out in *Sheet Metal Workers, supra*, 532 F.2d at 833 n.6, the seniority remedy is "far less drastic for a defendant" than the remedy of backpay. Moreover, the retroactive seniority afforded in *Acha* and *Chance* was, by the very nature of the remedy, limited to those who were actually employed. The relief of backpay in our situation would not be limited; the number of potential claimants and the potential burden on defendants is, as in *Sheet Metal Workers, supra*, much greater.

We all recognize the administrative burden that the trial of a backpay suit necessarily impose upon the district court. We fully recommend that the court utilize its full powers under 28 U.S.C. §636 and Fed. R. Civ. P. 53, to refer these matters to a special master, who may under the statute be magistrate if permitted by local rule, for a comprehensive report. *Pettway* v. *American Cast Iron Pipe Co., supra, 494 F.2d at 258. As the Pettway* court pointed out, this does not preclude a negotiated settlement.

C. *Liability of MCA.* MCA is a trade association of approximately 60 out of the some 300 heating, ventilating and air conditioning contractors in the New York area which employ steamfitters. The 60 MCA members employ the major share of the steamfitter labor force and MCA represents its members in collective bargaining negotiations and other labor relations. 360 F. Supp. at 985. Over the decade 1960-69, the MCA steamfitting contracts within the New York City and Nassau and Suffolk Counties never totaled less than $77 million and were as high as $118 million. *Id.* at 986. Generally speaking, steamfitting contractors maintain steady crews which are moved from job to job as work on new contracts begins and old contracts are completed. When additional personnel are required, some contractors hire them

directly; other contractors hire through their superintendents and in fewer instances through their foremen. *Id.* In collective bargaining negotiations in 1966 and 1969, MCA tried to require the indenturing into the industry of a minimum of 150 new apprentices annually, but the union rejected these proposals. *Id.* at 988. The court found that there was no evidence that "either Local 638 or MCA has engaged in purposeful discrimination against nonwhites." *Id.* at 990. But it did find that "the conditions of the industry . . . in combination with the history of discrimination in admissions to the A Branch of Local 638, give whites advantages in obtaining employment." *Id.* MCA was enjoined from further discrimination and ordered to maintain up-to-date records of available work, to submit an affirmative action program, to use its best efforts to provide apprentices with 1,750 hours of work per year and to maintain an employment register. The *Rios* plaintiffs argue, not without reason, that this relief could not have been ordered absent a finding of discrimination by MCA, purposeful or otherwise, and that all that is required to establish MCA's liability for backpay is the finding of discrimination; indeed, mere acquiescence in the discriminatory acts of the union would render it liable. *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d at 1381-82; *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 989 (D.C. Cir. 1973). *See also Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.), *petition for cert. dismissed*, 404 U.S. 1006 (1971). Absent any specific finding of discrimination, however, we conclude the district court's finding of nonliability on the part of MCA is not an abuse of discretion. *Guerra* v. *Manchester Terminal Corp., supra*, 498 F.2d at 655-56. As the district court held, making MCA a party defendant did not imply that MCA was "responsible *ipso facto* for all the employment practices . . . found unlawfully discrimina-

tory or . . . liable in damages to the plaintiffs in *Rios*. Plaintiffs have shown no specific instances of MCA discrimination." 360 F. Supp. at 995. And the union certainly had primary responsibility for the discrimination. We note that the decision below was without prejudice to any claim a member of the plaintiff's class may have against an employer, but MCA was not itself an employer, and no employers are parties to this action. *See* 400 F. Supp. at 922 n.4.

D. *Liability of the JAC.* The JAC as we have said is a joint labor management committee composed of four members chosen by MCA and four members chosen by Local 638. The major function of the JAC is to supervise the steamfitters' apprenticeship program. The four management trustees are designated by MCA and serve at the will of MCA, which can at any time terminate the designation of a trustee by resolution of the MCA board of directors. One of the JAC directors is the MCA executive secretary. The union trustees on the JAC are three of the principal union officers. The district court found that the apprenticeship program conducted by the JAC did not "fully meet the requirements of Title VII." 360 F. Supp. at 991. The court went on to hold that the written tests given to apprenticeship applicants since 1967 had a differential impact on nonwhites, and that the defendants had not met their burden of proving that the tests were "job-related," at least until they began administering the general aptitude test battery as indicated at the time of trial. *See* 360 F. Supp. at 992. However, the district court held that the

> JAC has "no" demonstrated responsibility for direct admissions to the A Branch of Local 638 of persons already qualified as journeymen steamfitters.
>
> Therefore, only Local 638 is liable for back pay.

400 F. Supp. at 992 (footnote omitted). Appellants claim

that the district court has abused its discretion by refusing to make the JAC jointly liable with the union for backpay damages. We disagree.

The reasoning of the district court is evidently premised on its view, fully supported in the record, that the union was the dominant factor in creating and perpetuating the discriminatory membership criteria. The courts could well have concluded from the record before it that although JAC was a participant in the lesser of the discriminatory practices, the major blame for both the discriminatory examinations and the more invidious direct admission policy lay squarely with the union. This consideration, in addition to the fact that it was the union and its members, rather that the JAC itself, which profited from the unlawful practices,[9] indicates that it was no abuse of discretion for the district court to require the union to shoulder the entire responsibility for backpay. *See Guerra* v. *Manchester Terminal Corp.*, *supra*, 498 F.2d at 655-56.

E. *Statute of Limitations.* In these combined actions, the Government filed suit on June 29, 1971 under Title VII and the private plaintiffs filed suit on February 26, 1971, under Title VII and also under 42 U.S.C. §§1981, 1983. The *Rios* plaintiffs had initially filed their charge of discrimination with the New York Division of Human Rights on August 19, 1970, and with the EEOC on October 15, 1970. When these actions were first brought there was no specific applicable federal statute of limita-

9. By artificially limiting the number of qualified union members, the union placed itself in a stronger bargaining position for wage increases in its negotiations with the contractors. Thus, while the union members economically benefited from the discrimination (not only in possible higher hourly rates or access to overtime pay, but also in the restriction of steamfitter employment to "white only"), the contractor members of the MCA were no better off and may well have had to pay higher wages than they would have in a freer labor market. The JAC is not shown to have received any economic benefit from the discrimination.

tions. On March 24, 1972, Congress enacted the Equal Employment Opportunity Act of 1972, §706(g) of which provides for a statute of limitations barring actions arising more than two years prior to the filing of a charge with the EEOC. 42 U.S.C. §2000e-5(g). The district court applied the 1972 statute retroactively to this case, reasoning that the amendment had "a bearing on congressional intent as to the limitation to be imposed in granting back pay awards." 400 F. Supp. at 992. Therefore the court ordered backpay only for the period after October 15, 1968.

We disagree with this retroactive application of the new statute of limitations rule, as have the Fifth and Sixth Circuits. *See EEOC* v. *Detroit Edison Co.*, 515 F.2d 301, 315 (6th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3214 (U.S. Oct. 7, 1975); *United States* v. *Georgia Power Co.*, 474 F.2d 906, 922 n.21 (5th Cir. 1973). The subsequent enactment cannot be indicative of the prior congressional intent.

Prior to the enactment of the federal statute, we would, of course, look to the analogous state statute of limitations. *See Chevron Oil Co.* v. *Hudson*, 404 U.S. 97, 104 (1971); *Jones* v. *Trans World Airlines, Inc.*, 495 F.2d 790, 799 (2d Cir. 1974); *Swan* v. *Board of Higher Education*, 319 F.2d 56, 59 (2d Cir. 1963). This rule has been applied in backpay cases as well. *See Franks* v. *Bowman Transportation Co.*, 494 F.2d 398, 405 (5th Cir. 1974), *aff'd*, 44 U.S.L.W. 4356 (U.S. Mar. 24, 1976); *Pettway* v. *American Cast Iron Pipe Co.*, *supra*, 494 F.2d at 258; *Johnson* v. *Goodyear Tire & Rubber Co.*, *supra*, 491 F.2d at 1378. The analogous New York statute of limitations is N.Y. Civ. Prac. L. R. §214(2) which establishes a three-year limit for "an action to recover upon a liability . . . created or imposed by statute . . . " This statute has been applied in the context of federal civil rights actions on more than one

occasion. *DeMatteis* v. *Eastman Kodak Co.*, 511 F.2d 306, 311-12 n.8 (2d Cir. 1975); *Kaiser* v. *Cahn*, 510 F.2d 282, 284 (2d Cir. 1974). Applying the three-year time bar, appellants would be entitled to assert backpay claims accruing as early as August 19, 1967, *i.e.*, three years prior to filing of the first charge with the New York Division of Human Rights. *See Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303, 308-09 (5th Cir. 1970).

We also agree with appellants that since the purpose of backpay is to make whole the victims of discrimination, *Albemarle Paper Co.* v. *Moody*, *supra*, the district court erred in setting June 21, 1973, the day when it ordered injunctive relief, as the termination date for the backpay award. Obviously, the injunctive relief did not provide for immediate entry into the A Branch for all identifiable victims of past discrimination (much less immediate job placement of those who had been denied equal job referrals). It is the date of actual remedying of discrimination, rather than the date of the district court's order, which should govern. *Patterson* v. *American Tobacco Co.*, No. 75-1259 (4th Cir. Feb. 24, 1976), slip op. at 23-25. We agree with the Government that to hold otherwise is to encourage the union to delay the remedial process rather than to encourage the rapid achievement of the discrimination victims' rightful place.

F. *Residence Requirement.* The district court required backpay claimants to prove residence within the geographic jurisdiction of the union at the time of the application for membership. The union argues that this limitation lies within the district court's discretion on the basis that residence is an indication of an individual's availability for work within the union's geographic jurisdiction. We fail to see the logical relationship of this argument to the issue whether a given individual is entitled to backpay. During the relevant period there was

no residence requirement for admission of qualified journeymen into A Branch. The membership requirements were that the applicant have five years' experience in the plumbing and pipefitting industry and good moral character. But the class, as defined by Judge Tenny, note 6 *supra*, entitled to relief is limited to those nonwhites residing in New York City and the Counties of Suffolk and Nassau, so that Judge Bonsal's order simply reflects that definition, and therefore we do not disturb it.

G. *Deduction of Public Assistance.* The district court ordered that "public assistance" was to be deducted from any backpay awarded. Title VII provides only that "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. §2000e-5(g). The *Rios* plaintiffs object to the offset of public assistance payments from backpay, and refer us to the NLRB model, so extensively relied upon by the Supreme Court in *Albemarle.* In the NLRB context, the Supreme Court held in *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361 (1951), that the Board has the power to enter an order refusing to deduct unemployment compensation payments from backpay. *See also Marshall Field & Co.* v. *NLRB*, 318 U.S. 253, 255 (1943). It is evidently NLRB policy to disallow deductions for collateral benefits of this nature, 340 U.S. at 365. But in *Satty* v. *Nashville Gas Co.*, 522 F.2d 850 (6th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3254 (U.S. Oct. 28, 1975), the Sixth Circuit held that a backpay award under Title VII is to be "reduced by temporary wages and unemployment insurance." *Id.* at 855. This statement was based on *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973), which in turn relied upon *Robinson* v. *Lorillard Corp.*, *supra*, 444 F.2d at 802, for the view that "[t]he back pay award is not

punitive in nature but equitable—intended to restore the recipients to their rightful economic status absent the effects of the unlawful discrimination." *See also Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 721 (7th Cir. 1969) (deduction of unemployment compensation proper as exercise of trial court discretion).

The weight of common law authority is that collateral sources are not deductible from a tort damage award. *See* 2 F. Harper & F. James, The Law of Torts §25.22, at 1343 n.1 (1956). *But see Coyne* v. *Campbell*, 11 N.Y.2d 372, 230 N.Y.S.2d 1, 183 N.E.2d 891 (1962) (New York law view is purpose of tort remedy is to restore the net rather than gross harm suffered by the plaintiff). However, in a number of states, where the collateral source is wholly derived from the contributions of the employer, offset for payments from the fund will be required. F. Harper & F. James, comment to §25.22 nn.5-6, at 153-54 (1968 Supp. to Vol. 2). Where payment has been received from a fund obtained only in part from contributions made by the defendant, the majority rule is that no offset is allowed. *Id.; see United States* v. *Harue Hayashi*, 282 F.2d 599 (9th Cir. 1960) (no deduction for federal Social Security benefits). Since funds for public assistance are collected only in part from the MCA members, and not even in part from the JAC and the union, the weight of common law authority would support denial of the offset.

As a matter of policy, however, we are inclined to agree with the *Satty* case and the rulings in other circuits which have held it not an abuse of discretion to deduct sums received from collateral sources such as unemployment compensation. While it was employer rather than union contributions that went toward the underlying payments of unemployment compensation by the Government, absent such a governmental scheme the bargaining power of unions would surely be increased and their wages (and

hence dues) very probably greater. We see no compelling reason for providing the injured party with double recovery for his lost employment; no compelling reason of deterrence or retribution against the responsible party in this case; and we are not in the business of redistributing the wealth beyond the goal of making the victim of discrimination whole.

H. *Pro Rata Modification.* The district court reserved the right in the event that the total award for backpay was too great for the union to pay either to modify the award on a pro rata basis or to provide for payments in installments. The district court has thus indicated that ability to pay is a factor it may consider in its determination of appropriate equitable relief under Title VII. *See United States* v. *Georgia Power Co., supra,* 474 F.2d at 919-22. While the parties have briefed the question extensively, we think the issue is premature at this stage and decline to take a position on it. *See* Part A, *supra.* We note, however, our agreement with the general proposition that remedial obligations under Title VII are just as important and entitled to just as great a call on the union resources as more traditional functions. The Title VII responsibilities, in other words, are of the same importance and entitled to the same support through dues or assessments of members as any other duty of the union. *Cf. Franks* v. *Bowman Transportation Co., supra,* 44 U.S.L.W. at 4364; *United States* v. *Bethlehem Steel Corp.,* 446 F.2d 652, 662-64 (2d Cir. 1971). But it would be an academic exercise for us to determine at this stage whether any given pro rata deduction under all the circumstances would or would not be permissible. The question may not arise; if it does then the balance of factors to be considered will be more concretely framed at that time.

II. Attorney's Fees

The district court found that the *Rios* plaintiffs' motion for attorney's fees $128,092.50 would ordinarily be awarded on the basis of the hours spent and rates suggested if the fees were to be paid by a profit-making defendant. 400 F. Supp. at 996.[10] *In view of the fact that the fees were ordered to be paid solely by Local 638, whose members will bear the burden, and in view of the fact that the Rios* plaintiffs were represented by a public interest law firm, the National Employment Project, which is substantially funded by the federal government via the EEOC, the district court reduced the award to $50,000. 400 F. Supp. at 993-97. On cross appeals the *Rios* plaintiffs claim the whole amount should be paid and Local 638 argues that the applicable statute,[11] which provides that only a prevailing party "other than the [EEOC] or the United States" may be awarded attorney's fees, requires that none of appellants' counsel should recover fees in this case. The union's claim is that since the National Employment Law Project is principally funded by the United States Government, to award fees to it would run counter to the statutory policy. As the union argues, and the First Circuit held in *Hoitt* v. *Vitek,* 495 F.2d 291, 220 (1st Cir. 1974), undertaking a non-fee-paying case is the job of a public interest attorney who is salaried principally through federal funding. Certainly any fee recovery will accrue to the funded Project, since the individual public interest attorney will not increase

10. There was full compliance with the stringent record-keeping requirements of *City of Detroit* v. *Grinnell Corp.,* 495 F.2d 448 (2d Cir. 1974).

11. 42 U.S.C. §2000e-5(k) which provides in part:

> In such action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs . . .

This takes the case out of the scope of *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975).

his income as a result of the award of fees.

But we read the statute to proscribe less than the union claims. The statutory prohibition applies only where the EEOC or the United States Government is the prevailing party. Here the *Rios* plaintiffs are the prevailing parties and their attorney, the Project, is neither a party nor a branch of the United States Government; rather, the Project is a nonprofit corporation which receives some of its funding from non-governmental sources. Even though that nonfederal funding is very small, we have no idea how long the federal funding may continue. Indeed, it may have been the intent of Congress that at some point public interest firms that are awarded fees will be able to function on their own, to carry out the beneficent purposes of the Act. Moreover, even if federal funding were to continue at pre-existing levels, an award of attorney's fees would presumably enable the Project to expand its activities beyond those possible under the federal grant. Accordingly we hold that the Project is entitled to an award.

The making of an attorney's fees award is discretionary under the statute. We do not think that the district court has abused its discretion by awarding the Project less than might have been paid to a non-federally funded law firm. As it turns out, dividing the fee by the total number of hours spent it appears that the rate per hour is approximately what defense counsel receive under the Criminal Justice Act.[12] This seems to us a permissible pay scale under all the circumstances.[13]

12. Fifty thousand dollars divided by 2449.75 hours, *see* 400 F. Supp. at 996, equals $20.41. *Cf.* 18 U.S.C. §3006A(d) ($30 per hour for time expended in court, $20 per hour out of court).

13. In *Torres v. Sachs*, Nos. 76-70002, -7072 (2d Cir. June 25, 1976), slip op. 4431, the court rejected the argument that publicly-funded law firms *must* be paid less than the rates applicable to fee-charging counsel. The court did not have before it the question whether the factor of public funding *could* be considered by the district court in its discretionary determination of an appropriate attorney's fee. We believe that the Title VII prohibition against fees for federal enforcement agencies indicates that it is appropriate for the district court, by analogy, to consider the factor of federal funding in its computation of a discretionary attorney's fee award.

Judgment in accordance with opinion.

**Opinion and Order of Bonsal, *U.S.D.J.*,
Dated June 21, 1973**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

June 21, 1973.

Nos. 71 Civ. 2877, 71 Civ. 847.

UNITED STATES of AMERICA,

Plaintiff,

v.

LOCAL 638, ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, COMPRESSED AIR, ICE MACHINE, AIR CONDITIONING AND GENERAL PIPEFITTERS, *et al.*,

Defendants.

GEORGE RIOS *et al.*,

Plaintiffs (*Complainants*),

v.

ENTERPRISE ASSOCIATION STEAMFITTERS
LOCAL UNION #638 OF U.A. *et al.*,

Defendants (*Respondents*).

BONSAL, *District Judge.*

This is an action brought by the Attorney General of the United States under Title VII of the Civil Rights Act of 1964 ("Title VII") (42 U.S.C. § 2000e et seq.) pursuant to authority granted to the Attorney General in that Act (42

U. S.C. § 2000e-6(a)). The defendants are four local unions in the building trades industry servicing metropolitan New York, and their counterpart Joint Apprenticeship Committees and employee associations. Separate trials were ordered for each local union and its counterparts. *See, e.g.*, the case involving Local 40, United States v. Local 638, Enterprise Association, etc., et al., 347 F. Supp. 169 (S.D.N.Y. 1972) (Gurfein, J.).

In the case of Local 638, Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Compressed Air, Ice Machine, Air Conditioning and General Pipefitters (hereinafter "Local 638"), the government's action (United States v. Local 638, et al., 71 Civ. 2877) was consolidated for purposes of trial with a private action (Rios v. Enterprise Association, etc. Local Union #638, et al., 71 Civ. 847) which had been instituted by four "nonwhites"[1]—allegedly the victims of unlawful employment discrimination—against Local 638, the Mechanical Contractors' Association (MCA), and the Steamfitting Industry's Joint Apprenticeship Committee (JAC). By order of Judge Tenney, the private action has proceeded as a class action on behalf of two distinct classes: a) all Negro and Spanish-surnamed Americans residing in New York City and the Counties of Suffolk and Nassau in the State of New York who now or at any time in the future have the skills necessary to work as journeymen steamfitters; and b) all Negro and Spanish-surnamed Americans residing in New York City and the Counties of Suffolk and Nassau in the State of New York who now or at any time in the future are capable of learning such skills and who wish to obtain

[1] The term "nonwhites" as used in this Opinion refers to black and Spanish-surnamed individuals.

access to steamfitting work in New York City and said Counties.[2]

A trial of the consolidated action commenced on January 15, 1973 and concluded on January 26, 1973. Decision was reserved, and the parties have submitted Proposed Findings of Fact, Conclusions of Law, and supporting Post Trial Memoranda.

THE COMPLAINTS

A. The Government Action (United States v. Local 638, etc., et al., 71 Civ. 2877)

Named as defendants in the government action are Local 638, MCA, and JAC. MCA is named as a defendant "for purposes of relief only pursuant to Rule 19(a)(1) of the Federal Rules of Civil Procedure." The complaint alleges that Local 638 is engaged in a pattern and practice of resistance to the full enjoyment by nonwhites of rights secured to them by Title VII of the Civil Rights Act[3] by:

> "(a) [f]ailing and refusing to admit nonwhite workmen into . . . [Local 638] as journeymen members on the same basis as whites are admitted;
>
> "(b) [f]ailing and refusing to refer nonwhite workmen for employment within [its jurisdiction] on the same basis as whites are referred by applying standards for referral which have the purpose and effect of ensuring referral priority to . . . A Branch members,

[2] See Memorandum filed in Rios v. Enterprise Association Steamfitters Local Union #638, 71 Civ. 847 (S.D.N.Y. August 10, 1971) (Tenney, J.).

[3] 42 U.S.C. § 2000e-2(c) and § 2000e-2(d).

> nearly all of whom are white, thereby perpetuating the effects of [its] past discrimination;
>
> "(c) [f]ailing and refusing to recruit blacks for membership in and employment through . . . [Local 638] on the same basis as whites are recruited;
>
> "(d) [f]ailing and refusing to permit contractors with whom . . . [Local 638 has] collective bargaining agreements to fulfill the affirmative action obligations imposed upon those contractors by Executive Order 11246 by refusing to refer out blacks whom such contractors wish to employ;
>
> "(e) [f]ailing and refusing to take reasonable steps to make known to non-white workmen the opportunities for employment in the . . . [steamfitting trade] . . . or otherwise to take affirmative action to overcome the effects of past racially discriminatory policies and practices."

The complaint alleges that JAC also is engaged in a pattern and practice of resistance to the full enjoyment by non-whites of rights secured to them by Title VII by:

> "(a) [f]ailing and refusing to make information concerning apprenticeship opportunities available to non-whites on the same basis as it is made available to whites;
>
> "(b) [f]ailing and refusing to make apprenticeship opportunities available to non-whites on the same basis as they are made available to whites by giving a preference in the selection of apprentices to friends and relatives of union members, nearly all of whom are white;

"(c) [a]dopting standards for the selection of apprentices which are not job related and which operate to disqualify a disproportionate number of non-white applicants for apprenticeship."

B. The Rios Action (Rios, et al. v. Enterprise Association Steamfitters Local Union #638, etc., 71 Civ. 847)

This class action was brought by four nonwhites[4] on behalf of nonwhites who have, or are capable of learning, the skills necessary to work as journeymen steamfitters within the jurisdiction of Local 638.[5] The complaint names as defendants Local 638, MCA, and JAC, and alleges that the three defendants in concert have failed to admit plaintiffs to membership in the A Branch of Local 638 (journeymen) and to participation in the JAC apprenticeship program on the same basis as whites, and that the defendants have failed to provide nonwhite A Branch members with equal access to job opportunities as journeymen steamfitters. Plaintiffs sue under the Fifth and Fourteenth Amendments to the United States Constitution, 42 U.S.C. §§ 1981 and 1983, and Title VII.

Defendant MCA has moved to dismiss the Rios complaint against it on the grounds that it is neither an "employer" within the meaning of 42 U.S.C. § 2000e–2(a) nor an "employment agency" within the meaning of § 2000e–2(b), and that the complaint fails to state a cause of action against it. Plaintiffs oppose MCA's motion.

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[4] The complaint sets forth that "[p]laintiffs Rios, Jenkins, and Lewis are fully qualified steamfitters whom the Union [Local 638] refuses to refer for work and to admit to membership. Plaintiff Rutledge has been denied admission to the apprenticeship program operated by the Defendants even though he is intelligent, able-bodied and fully capable of doing steamfitting work if given reasonable training."

[5] See Rios v. Enterprise Association Steamfitters Local Union No. 638, 326 F.Supp. 198 (S.D.N.Y. 1971) (Frankel, J.) (decision on motion of plaintiffs for a preliminary injunction).

BACKGROUND FACTS

1. Local 638 is a labor union whose territorial jurisdiction consists of the five boroughs of the City of New York and Nassau and Suffolk counties.

2. Local 638 is a member of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry ("United Association").

3. Local 638 represents its members in collective bargaining with defendant MCA and other steamfitter contractors.

4. Local 638 has two branches: a construction or A Branch, whose members have the status of journeymen and do mainly construction work; and a metal trades or B Branch, whose members work in shops and do repair work.

5. Since 1960, the journeymen membership of the A Branch has been as follows:

Year	Total Members	Blacks	Spanish-surnamed
1960	3644	0	0
1961	3587	0	0
1962	3541	0	0
1963	3528	0	0
1964	3598	0	0
1965	3541	0	0
1966	3549	0	0
1967	3646	5	2
1968	3822	5	2
1969	3866	14	7
1970	3827	14	7
1971	3850	21	10
1972	4198*	129	62

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* Computed from the stipulated number of members in 1971 plus the stipulated number of additional members during 1972.

6. Since 1960, the number of members of the B Branch has been as follows:

Year	Total Members	Blacks	Spanish-surnamed
1960	2220		
1961	2337		
1962	2545		
1963	2657		
1964	2847		
1965	2809		
1966	2875		
1967	2774		
1968	2866		
1969	3335		
1970	3656		
1971	3862	300*	200*

7. As of September, 1971, at least 399 (11%) of the A Branch members were related by blood or marriage to other members of the union; it is common for relatives to be working on the same job site.

8. Members of the A Branch have a higher hourly rate of pay than members of the B Branch. Being a member of the A Branch is a substantial aid in obtaining a job as a construction steamfitter in the territorial jurisdiction of Local 638 and is a prerequisite to obtaining job security and preventing early layoffs. Another advantage of A Branch membership is the greater opportunity for advancement and for earning overtime pay.

9. Workers in the construction steamfitting industry are engaged in the installation of refrigeration, air condition-

* Approximate. Figures were not available for prior years.

ing, heating, ventilating, pneumatic tube, and sprinkler systems in office buildings, apartment houses, power plants, and other large structures. It is the job of steamfitters on these construction sites to connect the various pipes, pumps, ducts, fixtures, and valves that these systems require. It is necessary for a steamfitter to know how to measure, cut, thread, and connect pipe. In addition, it is necessary that at least some of the steamfitters on a job site know how to weld pipe "in position." Since incompetent work may necessitate redoing the job or may endanger fellow workers or future occupants of the structure, steamfitters must know and follow recognized safety procedures.

10. MCA is a trade association of approximately 60 heating, ventilating, and air conditioning contractors in the New York area. While the total number of contractors employing steamfitters exceeds 300, the 60 MCA members employ the major share of the steamfitter labor force. MCA represents its members in collective bargaining negotiations and other labor relations matters with Local 638.

11. Pursuant to a 1960 Declaration of Trust, the Steamfitters Industry Educational Fund was created, with a Board of Trustees, four of whom are chosen by Local 638 and four by MCA. The trustees appoint JAC, a joint labor-management committee of eight members.

12. All of the present and past officers and business agents of Local 638 are white. All of the present and past officers of MCA are white. Since its formation, all members and employees of JAC have been white.

13. In 1973, the nonwhite membership of the A Branch (191 members) constituted 4.5% of the total membership of

the A Branch. According to 1970 census figures, the related population statistics for the seven counties within the jurisdiction of Local 638[6] are as follows: Black and Puerto Rican persons constitute 25.09% of the total population of the seven counties; black persons and persons reporting the Spanish language as their mother tongue constitute 30.06% of the total population of the seven counties.

14. Each applicant for membership in the A Branch must have at least five years of practical working experience in the plumbing and pipefitting industry and must be of good moral character. In some instances, these requirements have not been strictly adhered to.[7]

15. Procedurally, applicants to the A Branch send letters to the union stating their qualifications, which letters are reviewed by a committee composed of three of the union's officers. These applications are kept on file and when additional members are needed—a determination which is based upon the demand for labor—applicants are called down, interviewed, and if they have the necessary qualifications, accepted.

16. The steamfitting industry is subject to fluctuations and cyclical unemployment. During the years from 1960

[6] Local 638's jurisdiction covers the following counties: Bronx, Kings, Nassau, New York, Queens, Richmond, and Suffolk. The population figures are taken from U. S. Department of Commerce, Bureau of the Census, Census of Population: General Social and Economic Characteristics, New York (PC (1)–C34 N.Y.) (1970).

[7] For example, the evidence at trial disclosed that Thaddeus Kryjak became a member of the A Branch of Local 638 through the sponsorship of his father-in-law after about three years experience; Frederick Gruter became a member of the A Branch after about two years as a helper; Frank Catapano transferred to the A Branch from the B Branch after 4 years of experience.

to 1969, the total dollar value of all steamfitting contracts awarded to members of MCA to be performed within New York City and Nassau and Suffolk counties was as follows:

1960	$ 88,830,736
1961	92,464,643
1962	104,869,893
1963	99,095,020
1964	94,227,895
1965	77,570,242
1966	93,103,558
1967	95,759,129
1968	107,966,466
1969	118,990,480

17. In the post-war era, there has been a shortage of construction steamfitters in the New York area as well as a shortage of welders. Employers have been required to expend substantial monies for overtime. A computer study of overtime hours from 1967 to 1971 indicates the following:

Year	Total overtime hours*	Average per week
1967	481,967	2.47
1968	432,206	2.97
1969	453,807	2.96
1970	541,195	3.55
1971	724,172	3.67

18. By reason of the shortage of manpower, Local 638 has referred B Branch men to work as construction steamfitters.

* The term "overtime hours" includes both hours worked in excess of the normal 7-hour day and also hours worked outside of the usual work schedule, from 8:00 a. m. to 3:30 p. m.

19. Local 638's application procedures are designed to keep the A Branch from being flooded, by admission of only a small number of new A Branch members, which tends to continue the shortage of A men and tends to give them job security and overtime.

20. Local 638 does not maintain a hiring hall, nor does it keep formal records of available jobs or of unemployed steamfitters who are seeking work within its territorial jurisdiction. The general practice is for steamfitting contractors to maintain steady crews, which are moved from job to job as work on new contracts begins and old contracts are completed. Hiring of men in addition to the steady crews is done directly by some contractors; other contractors hire men through their superintendents and in fewer instances through their foremen.

21. There is no formal method of referring workers for employment in the steamfitting industry in the New York area. Information concerning available employment is circulated informally by word of mouth and other means. Steamfitters seek work primarily by contacting A Branch members of Local 638, employers' foremen and superintendents, and occasionally officers and agents of Local 638. Employers seek steamfitters by contacting members of Local 638 through their superintendents and foremen, and by contacting Local 638 and MCA.

22. JAC conducts a 5-year apprenticeship training program consisting of a total of 720 hours of classroom work at the Delehanty Institute and Voorhees Technical Institute and 9100 hours of employment with steamfitter employers at construction sites. Upon successful completion of the

program, an apprentice becomes a journeyman member of the A Branch. The apprenticeship program was designed and developed by the United Association and the Mechanical Contractors Association of America in consultation with the United States Department of Labor, Bureau of Apprenticeship and Training. The national program has been registered with the United States Department of Labor, and the local program has been registered with the New York State Department of Labor.

23. Apprentices are paid a percentage of a journeyman's wages according to the following schedule:

1st year	40%	of	journeyman	wages
2nd year	50%	"	"	"
3rd year	60%	"	"	"
4th year	70%	"	"	"
5th year	85%	"	"	"

In addition, apprentices receive fringe benefits. The collective bargaining agreement also requires contractors to pay apprentices for five of the seven hours of class which apprentices attend once every other week, with some members of MCA voluntarily paying apprentices for the full 7-hour work day.

24. The first apprenticeship class was formed by JAC on December 15, 1947. As of July 19, 1971 (after the most recent class was indentured) 973 of the journeymen members of the A Branch had at some time been enrolled in the apprenticeship program. This number constitutes less than 25% of the total membership of the A Branch at present, though the percentage of members of the A Branch who are graduates of the apprenticeship program is increasing.

25. Prior to 1964, apprenticeship applicants were selected on the basis of a personal interview conducted by members of JAC and there was no formal method of announcing the formation of new apprenticeship classes. No non-whites became apprentices prior to 1964.

26. JAC instituted a written aptitude examination as part of the apprenticeship program selection procedure in 1964. In that year, JAC, with the advice of New York University, was responsible for the selection of the tests and the determination of the passing score. There were no classes indentured in 1965 and 1966. In 1967, 1968, 1969, 1970, and 1971, JAC, with the advice of the Stevens Institute of Technology, was responsible for the selection of the tests and determination of the passing score. The written aptitude examination was in four parts: 1) Verbal meaning (the ability to understand ideas in words); 2) Numerical ability (the ability to work with numbers and handle simple quantitative problems); 3) Mechanical reasoning (the ability to understand and apply basic mechanical principles); and 4) Spatial relations (the ability to visualize objects in 3-dimensional space).

27. In 1964, no applicant was refused admission to the program on the basis of his test scores. Since 1967, the test results have been as follows: Of the 1177 white applicants who have taken a written examination, 487 (41.37%) passed; of the 106 black applicants, 11 (10.37%) passed; and of the 18 Spanish-surnamed applicants, 2 (11.11%) passed.[8]

[8] The parties stipulated to the breakdown of the test scores as set forth in the Appendix.

28. Since 1966, applicants have been required to furnish: 1) a high school or equivalency diploma; 2) evidence that they are between 18 and 24 years of age, with an allowance for military service up to the age of 28; 3) a listing of arrests and the outcome of each, except for minor traffic violations; 4) evidence of residency in the New York metropolitan area for three years (reduced to one year in 1968); 5) sponsorship by a member of the A Branch; and are required to undergo a physical examination by a doctor selected by JAC. Applicants were also given an oral interview by members of JAC to orient them to the apprenticeship program, but there is no evidence that admission to the apprenticeship program has been denied solely on the basis of the oral interview.

29. Since the filing of the *Rios* action in 1971, JAC has modified its standards for admission to the apprenticeship program.

30. With respect to the class to be indentured in 1973, JAC proposes the following requirements: 1) that the applicant take and pass one of the tests (S-61R) of the General Aptitude Test Battery (GATB) of the United States Training and Employment Service; 2) that the applicant be between the ages of 18 and 24 (with credit for military service up to the age of 28); 3) that the applicant have a high school or equivalency diploma; and 4) that the applicant demonstrate physical capacity to do the work. In addition, JAC proposes to conduct an interview of applicants and at such time to inquire about each applicant's motivation, education, work history, health, and family back-

ground, though at the time of the trial, no format for the interview had been determined.[9]

31. As of July 9, 1971, there were 408 participants in the apprenticeship program of whom 12 (2.94%) were black and 4 (0.98%) were Spanish-surnamed. In June 1972, 32 apprentices (all of them white) graduated from the program; currently there are 376 participants in the apprenticeship program of whom 12 (3.19%) are black and 4 (1.08%) are Spanish-surnamed.

32. Since 1964, 492 apprentices have been indentured of whom 464 (94.3%) were white, 23 (4.67%) were black, and 5 (1.01%) were Spanish-surnamed, as follows:

	White	Black	Spanish-surnamed	Total
1964	47	7	1	55
1965	0	0	0	0
1966	0	0	0	0
1967	43	2	0	45
1968	86	5	2	93
1969	94	5	2	101
1970	94	2	0	96
1971	100	2	0	102
1972	0	0	0	0
Totals	464	23	5	492

33. Of the 492 apprentices who have been indentured since 1964, 31 whites (6.7%) and 7 nonwhites (25%) had dropped out of the program by the end of 1971.

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[9] During the pendency of this action, JAC conducted interviews of approximately 1400 apprenticeship applicants for the 1973 class. The Court was advised that based on the information obtained at the interviews and on the results of the written examination, the applicants were ranked from "1" to "1400". The parties propose that selections be made from this list.

34. MCA, in its collective bargaining negotiations in 1966 and 1969, proposed to amend the previous agreements to require the indenturing into the industry of a minimum of 150 new apprentices annually, which proposals were not incorporated in the resulting collective bargaining agreements. The union's stated reason for rejection of such proposals was to ensure reasonably continuous employment opportunities for apprentices as required by the New York State Department of Labor, Bureau of Apprenticeship Training.

35. The principal affirmative action taken by Local 638 and JAC to increase non-white participation in the steamfitting industry has been its participation in the New York Plan since its inception in 1971. The New York Plan is a joint effort of the construction industry, New York City, and New York State to increase the participation of minority employees in the construction industry. The Plan's goal has been to recruit and place in jobs 800 minority trainees who are above the age of enrollment in the various apprenticeship programs in the construction industry.

36. Of the 800 trainee positions, 90 "slots" were allocated to Local 638, which placed 81 trainees. Currently, 66 trainees are actively employed. The qualifications of those trainees are assessed by representatives of Local 638, MCA, and a minority group representative of the Plan. Some of the Local 638 trainees have received advanced placement and, consequently, receive the wages of more advanced apprentices.

37. The New York Plan has not been an unqualified success. Trainees are not told that they will automatically be-

come members of the A Branch when they complete the program, and only one nonwhite has become an A Branch member. In January, 1973, New York City withdrew from the Plan on the grounds that the small number of trainees placed was unacceptable.

38. In the past, Local 638 has discriminated against minority workmen in admitting members to the A Branch. There were no nonwhite journeyman members of the A Branch until 1967. Since 1967, only five nonwhites have become journeyman members of the A Branch through the apprentice program.

DISCRIMINATION IN ADMISSION TO THE A BRANCH

In issuing the preliminary injunction of January 3, 1972 (in the Government action), this Court found that Local 638 had discriminated against nonwhites in admissions to the A Branch. Both the admission figures for 1972 and the membership and population statistics indicate that discriminatory practices have not been corrected.

Since January 1, 1972, 160 black and Spanish-surnamed workers already employed in the steamfitting industry were admitted to full journeyman status in the A Branch; this number represents 154 of the 169 workers whose admission was directed by Order of this Court dated January 3, 1972, and 6 who were admitted pursuant to agreement between the Government and Local 638. Other than as a result of this Order, no nonwhites were admitted to the A Branch in 1972. On the other hand, 156 whites were admitted to the A Branch without completing the apprenticeship program and without taking either a written or a practical examination, and an additional 32 whites were admitted to the A

Branch through the apprenticeship program. This practice of admitting whites by informal standards and without reference to the apprenticeship program while denying such admission to nonwhites is discriminatory and unlawful. See United States v. Bethlehem Steel Corporation, 446 F.2d 652 (2d Cir. 1971).

The membership and population statistics also suggest that Local 638 has engaged in a pattern and practice of discrimination against nonwhites. The present membership of the A Branch of Local 638 is 4.5% nonwhite, while the population of New York City and Nassau and Suffolk Counties, according to available 1970 census statistics, is approximately 25.09% to 30.06% nonwhite. These figures and the testimony at trial support the prima facie showing of discriminatory conduct made by the Government at the time of the issuance of this Court's preliminary injunction. See United States v. Wood, Wire and Metal Lathers International Union, Local No. 46, 471 F.2d 408, 414 n.11 (2d Cir.), cert. denied, 41 U.S.L.W. 3643 (U.S. June 11, 1973); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 426 (8th Cir. 1970) and cases cited therein; Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 247 (10th Cir. 1970); United States v. Hayes International Corp., 415 F.2d 1038, 1043 (5th Cir. 1969). *Cf.* Stone v. F.C.C., 151 U.S.App.D.C. 145, 466 F.2d 316, 332 (1972); Roberts v. St. Louis Southwestern Ry., 329 F.Supp. 973, 977 (E.D.Ark. 1971).

It is not necessary to determine whether Local 638 has purposefully discriminated in admissions to the A Branch in order to find its practices unlawful. As the Supreme Court declared in Griggs v. Duke Power Co., 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed. 2d 158 (1971):

> "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mecha-

nisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."

See also Chance v. Board of Examiners, 458 F.2d 1167, 1175-1178 (2d Cir. 1972), aff'g 330 F.Supp. 203, 223 (S.D. N.Y. 1971).

In light of the foregoing, the Court finds that Local 638, in the past and continuing to the present, has engaged in a pattern and practice of discrimination against nonwhites in admission to the A Branch.

Under Title VII, district courts have been vested with broad power to grant affirmative relief to combat the often subtle practices of discrimination. United States v. Wood, Wire and Metal Lathers International Union, Local No. 46, *supra,* 471 F.2d at 413 & n.9. The evidence at trial, including the testimony as to various Armed Forces programs for training men in basic plumbing and steamfitting skills,[10] satisfies the Court that the basic skills of the steamfitting trade can be readily taught to nonwhites. Moreover, the history of past discrimination makes it imperative that nonwhite workmen should be admitted to the A Branch as soon as they can demonstrate that they have the necessary skills. Certainly, graduates of the apprenticeship program should qualify for admission to the A Branch as soon as they complete the program. But in addition, a way should

[10] There was testimony at the trial that the United States Navy conducts a training program for utilities men covering the basic skills of pipefitting, plumbing, boile· operation, water treatment, sanitation, refrigeration, and air conditioning. The course (termed the "A School") includes both classroom and practical instruction and lasts 14 weeks. Afterwards, the men receive ratings as designated utilities men, and they are sent out to work with a naval construction battalion for further "on the job training" for a period of approximately 2 years. In addition, the Navy maintains a school (the "B School") for more advanced training.

be devised to admit others who have experience in the trade and who demonstrate, by means of a practical examination, that they possess the skills necessary to work as journeymen steamfitters.

DISCRIMINATION IN WORK REFERRAL

The general practice in the steamfitting industry is for contractors to maintain steady crews of men, which are shifted from site to site as construction needs change. When additional men are needed, site foremen or superintendents generally hire men from among those who apply for work by visiting the sites and contacting the foremen. Steamfitters learn of openings by contacting A Branch members who are working on sites needing men or who hear of openings; occasionally they seek the help of Local 638's business agents or officers.

Local 638, however, does not maintain a hiring hall, nor is there any formal referral mechanism or service in the industry in New York City. Local 638 does not keep formal records of available jobs nor of steamfitters seeking work. The foremen and on-site superintendents, who occasionally hire steamfitters to supplement their regular crews, are for the most part white,[11] and, as the evidence at trial indicated, many are present or former members of the A Branch of Local 638. In addition, at least 11% of the members of the A Branch as of the commencement of the present actions

[11] The evidence indicates that at the time of the trial, there were two nonwhite employers and two nonwhite foremen in the New York area. The evidence also discloses that all of the present officers and business agents of Local 638 and all the officers of MCA are white.

are related by blood or marriage to other members of the union.

While there is no evidence that either Local 638 or MCA has engaged in purposeful discrimination against nonwhites[12] the conditions of the industry set forth above, in combination with the history of discrimination in admissions to the A Branch of Local 638, give whites advantages in obtaining employment. The result is the preservation of the effects of past discrimination. Accordingly, the referral practices of the steamfitting industry must be modified if past discriminatory patterns are to be corrected. See United States v. Local 638, Enterprises Association, etc., et al., 347 F.Supp. 169, 180-181 (S.D.N.Y. 1972) (Gurfein, J.), and cases cited therein.

This Court has broad power under Title VII to grant affirmative relief to correct the subtle and elusive patterns of discrimination. *Cf.* Morrow v. Crisler, 479 F.2d 960 (5th Cir. 1973). A first step should be to require that Local 638 and MCA maintain up to date records of jobs available[13] and of steamfitters seeking work. These records should be open to all interested parties, including employers, MCA, union business agents and officers, individual steamfitters,

[12] Compare the situation found to exist in the metallic lathing, furring, and concrete reinforcing trade, where Judge Frankel found in numerous specific instances that favoritism for whites and discrimination against blacks had been proven. United States v. Wood, Wire and Metal Lathers International Union, Local Union 46, 328 F.Supp. 429, 436-438 (S.D.N.Y. 1971), aff'd, 471 F.2d 408 (2d Cir.), cert. denied, 41 U.S.L.W. 3643 (U.S. June 11, 1973).

[13] The list of employers under contract with Local 638, which is now maintained by the union and is furnished to union members, will serve as a starting point. By itself, however, this list is insufficient to inform steamfitters looking for work of which contractors have job opportunities available.

and "minority referral services."[14] In addition, the Administrator to be appointed hereunder, after studying the industry, will consider and recommend to the Court the adoption of other affirmative action measures to increase nonwhite participation in the steamfitting industry.

DISCRIMINATION IN THE APPRENTICESHIP PROGRAM

The present apprenticeship program conducted by JAC requires that an apprentice complete five years of training consisting of 720 hours of classroom work and 9100 hours of on-the-job experience before he may become a journeyman member of the A Branch of Local 638. According to testimony at the trial, the present program was designed in consultation with the United Association and the Mechanical Contractors Association of America and is registered with the United States Department of Labor and the New York State Department of Labor.

For the reasons below, however, the Court finds that the present apprenticeship program does not fully meet the requirements of Title VII. Accordingly, the program will be altered as described below and will be subject to further alteration upon the recommendation of the Administrator to be appointed hereunder.

In determining whether the apprenticeship program meets Title VII requirements, the starting point is Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971):

[14] E.g., the Recruitment and Training Program, Inc. (formerly the Joint Apprenticeship Program of the Workers Defense League).

> "The [Civil Rights] Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431, 91 S.Ct. at 853.

The initial question is whether plaintiffs have established that features of the apprenticeship program have a sufficiently discriminatory impact on nonwhite applicants to impose upon the defendants the burden of establishing "job relatedness." Plaintiffs must show that the program disadvantages nonwhites to a "significant and substantial" degree. Chance v. Board of Examiners, 458 F.2d 1167, 1175 (2d Cir. 1972). If plaintiffs make such a showing, then defendants must demonstrate that the practice is justified notwithstanding its discriminatory effect. Chance v. Board of Examiners, *supra*. This involves demonstrating both a "business necessity" for the practice and also that its legitimate ends canont be served by a reasonably available alternative system with less discriminatory effects. See United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971). The requirements of these cases apply with respect to both the method for selecting apprentices and the length and content of the program.

A. Selection of Apprentices

The first apprenticeship class was formed by JAC in 1947. Until 1964, there were no nonwhites in the program. Since 1964, 492 apprentices have begun training, of whom 464 (94.3%) were white, 23 (4.6%) were black, and 5 (1.01%) were Spanish-surnamed. In 1971 (when the last

apprentice class was formed), nonwhites constituted approximately 3.9% of the total number of participants in the apprenticeship program. Population statistics from the 1970 census indicate that nonwhites constitute approximately 25.09% to 30.06% of the total population of New York City and Nassau and Suffolk Counties. This is sufficient to indicate a prima facie case of discrimination against nonwhites in the selection of apprentices. See United States v. Wood, Wire and Metal Lathers International Union, Local No. 46, *supra*, 471 F.2d at 414 n. 11; Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 426 (8th Cir. 1970), and cases cited therein. Therefore, the burden is on the defendants to show that the features of the present selection system are justified, notwithstanding the discriminatory impact on nonwhites.

1. *The Written Examination*

The stipulated results of the written tests given to apprenticeship applicants since 1967 (but not including the tests given in 1973) indicate that they have had a differential impact on nonwhites when compared with the results for whites. While the passage rate for whites was 41.37%, the passage rate for blacks was 10.37%, and for Spanish-surnamed applicants, 11.11%.

To show that the tests were "job related," defendants produced testimony at trial that the tests were widely used and professionally designed; that they were administered by Stevens Institute of Technology, a reputable testing institution; and that they were reasonably related to measuring the aptitudes they were designed to measure in the following four areas: verbal meaning, numerical ability, mechanical reasoning, and spatial relations. This, however,

is not sufficient to demonstrate the written examinations' validity or "job relatedness."

The Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures ("EEOC Guidelines"), 29 C.F.R. § 1607, et seq., recognize three methods of validating the job relatedness of a given test: criterion-related validity, content validity, and construct validity.[15] With respect to the tests given by Stevens Institute, while there was some evidence of construct validity, there was no evidence of their criterion-related validity nor that a criterion-related study had been completed or planned. Without such evidence, the tests used by JAC from 1964 to 1971 cannot be considered job related, notwithstanding the difficulty of devising a fair test or of testing it for validity. *Cf.* Vulcan Society of New York City Fire Department, Inc., et al. v. Civil Service Commission, et al., 360 F.Supp. 1265 (S.D.N.Y., filed June 12, 1973) (Weinfeld, J.).

JAC indicated at trial that in the future it intended to employ a different test to select apprentices. This test is part of the General Aptitude Test Battery ("GATB") of

[15] These terms are defined in American Psychological Association, Standards for Educational and Psychological Tests and Manuals at 12-15 (1966). Evidence of criterion-related validity is preferred; it is demonstrated by "comparing the test scores with one or more external variables considered to provide a direct measure of the characteristic or behavior in question." In employment testing, the comparison is made between test scores and measures of job performance; if there is a sufficient correlation, then the test is considered to have validity in predicting job performance and thus to be "job related." Content validity is demonstrated by "showing how well the content of the test samples the class situations or subject matter about which conclusions are to be drawn." A test has content validity when the content of the test matches the content of the job to be performed. Construct validity is evaluated by "investigating what qualities a test measures, that is, by determining the degree to which certain explanatory concepts or constructs account for performance on the test."

the United States Training and Employment Service and has been denominated "S–61R". A validation study was done on this test in Texas in 1954, though the study did not separately determine the effect of the test on minorities. *Cf.* EEOC Guidelines, 29 C.F.R. § 1607.5(b)(5). While at the present time there is no evidence that S–61R may not discriminate against nonwhites, there is equally no evidence that it does. It appears that in other contexts courts have approved use of the GATB. *See, e. g.,* United States v. Local 86, Ironworkers, D.C., 315 F.Supp. 1202, 1246 (1970), aff'd, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971). In view of the lack of evidence that S–61R has a differential impact on nonwhites and since JAC does not intend to disqualify apprenticeship applicants solely on the basis of their test results, the Court will permit the use of S–61R pending a further recommendation from the Administrator to be appointed hereunder.

2. *Age Requirements*

At present, the apprenticeship program is only open to those applicants who are between the ages of 18 and 24, though credit is given for years spent in military service up to the age of 28. No evidence was presented that this requirement itself had a discriminatory impact on nonwhites; however, in view of the history of past discrimination in the steamfitting industry, this requirement may operate to exclude from the apprenticeship program nonwhites who are now too old to apply. Accordingly, provision will be made so that nonwhites who may have been excluded from the program in the past but who have nevertheless acquired experience in the trade will have the opportunity

during a specified period of time to seek admission to the A Branch by passing a practical examination or by obtaining the certification of an employer who is a party to the collective bargaining agreement. In addition, provision will be made so that applicants between the ages of 18 and 30 may apply to the program. JAC may continue thereafter to use an age requirement for admission to the apprenticeship program, though such requirement will be subject to modification upon the recommendations of the Administrator.

3. *Educational Requirements*

The present requirements are that applicants have a high school or equivalency diploma. According to 1970 census statistics, 45.8% of nonwhite males between the ages of 18 and 24 and 76.1% of white males between the ages of 18 and 24 in the New York Standard Metropolitan Statistical Area had completed high school. This disparity indicates that such a requirement has a differential impact on nonwhites, operating to exclude a greater number of nonwhites from the apprenticeship program.

In Griggs v. Duke Power Co., *supra,* the Supreme Court found that the requirement of a high school diploma as a condition of employment in a generating plant did not bear a demonstrable relationship to successful job performance. 401 U.S. at 431, 91 S.Ct. 849. On the other hand, in United States v. Local No. 86, Ironworkers, *supra,* the district court approved the use of the high school diploma requirement for applicants to apprentice programs in certain construction trades. 315 F.Supp. at 1246.

On the present evidence, a determination cannot be made as to whether a high school or equivalency diploma is a

job-related requirement for admission to the apprenticeship program. It cannot be said, however, that there should be no educational requirement. Certainly, to understand the classroom instruction offered during the apprenticeship program, apprentices must have some schooling. Accordingly, pending a recommendation by the Administrator and the adoption of an affirmative action program, the present educational requirement will be continued.

4. *Physical Ability*

The present requirement is that applicants demonstrate the physical capacity to do the work required of a steamfitter. Since no evidence was introduced that this requirement had a differential impact on nonwhites and since physical ability to perform the work is obviously job-related, this requirement needs no further justification.

5. *The Interview*

As with the apprenticeship class of 1973, JAC proposes to have applicants interviewed orally by 2-man teams of JAC members (one to represent Local 638 and one to represent steamfitting contractors). In the interview, the teams will inquire into each applicant's motivation, education, work history, health, and family background. In addition, the interviewers propose to ask each applicant whether he has been convicted of a job-related crime within the past 5 years.

Since the present format of the interview is a new feature of the selection process, there is no evidence as to whether it has a differential impact on nonwhites. Unless such a showing is made, the Court will permit the use of the inter-

view in the selection of apprentices, pending a recommendation from the Administrator.

B. Length and Content of the Apprenticeship Program

The present program is 5 years long and includes both classroom instruction for one day every two weeks and also on-the-job experience. The classroom instruction is comprehensive, including both theoretical as well as practical subjects relating to the steamfitting field. The program was developed with the consultation and approval of Local 638 and MCA.

While there is some evidence that nonwhites drop out of the program with greater frequency than whites,[16] the evidence introduced at trial does not disclose with specificity what the underlying reasons were. In any event, JAC plans in the future to decrease to 4 years the length of the program.

On the present record, a determination of whether the length and content of the apprenticeship program conforms to the requirements of Title VII cannot be made. Moreover, this is a determination better left to the affirmative action program, which will be adopted after considering the recommendations of the Administrator to be appointed hereunder. Accordingly, pending the adoption of the affirmative action program, the present apprenticeship program will be continued in its present form but will be shortened to 4 years.

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[16] The dropout figures indicate that 31 white (6.7%) have left the program as compared with 7 nonwhites (25.0%).

MCA's MOTION TO DISMISS

MCA was named in the government action as a defendant for purposes of relief only. In the Rios action, however, MCA was named as a defendant on the merits on the grounds that it is an "employer" within the meaning of 42 U.S.C. § 2000e(b) or an "employment agency" within the meaning of 42 U.S.C. § 2000e(c). In addition, the Rios plaintiffs contend that MCA is properly named as a defendant under 42 U.S.C. § 1981 and § 1983.

Section 2000e(b) provides:

> "The term 'employer' means a person engaged in an industry affecting commerce who has twenty-five or more employees . . . and any agent of such a person."

Section 2000e(c) provides:

> "The term 'employment agency' means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person."

Section 2000e(a) provides:

> "The term 'person' includes one or more individuals, labor unions, partnerships, associations, . . ."

In Williams v. New Orleans Steamship Association, 341 F.Supp. 613 (E.D.La. 1972), the Court held that an association of employers would be treated as a single employer for purposes of Title VII. There, the complaint named as defendants the New Orleans Steamship Association, its 28 member companies, and 4 local unions, together with the International Longshoremen's Association. Twelve of the

member companies moved to dismiss the complaint against them for lack of jurisdiction inasmuch as they had fewer than the required number of employees to subject them to Title VII's coverage. The Court denied the motion, relying on EEOC policy that "if establishments are part of an integrated enterprise, they may be treated as a single employer for Title VII coverage." 341 F.Supp. at 615. Plaintiffs there had shown that the association controlled employment on the waterfront and established uniform employment policies and practices applicable to all member companies. In addition, the association owned and operated a central hiring hall at which all longshoremen were hired, and derived its broad authority by delegation from its member companies. In determining whether the 28 companies should be treated as a single employer through the entity of the association, the Court followed the practice of the EEOC in focusing on whether there was an interchange of employees and centralized control of labor relations.

In view of the national public policy reflected in Title VII to end employment discrimination based on race, color, or national origin, see Hackett v. McGuire Brothers, Inc., 445 F.2d 442, 446-447 (3d Cir. 1971), this Court finds the factors summarized in *Williams* to be persuasive here. Section 2000e(b) includes within the definition of "employer" both a person "who has twenty-five or more employees" and "any agent of such a person." MCA, as a trade association for purposes of unified collective bargaining, performs the functions of an agent for its member contractors. In addition, MCA is equally represented with Local 638 on JAC, which administers the industry's apprenticeship program. MCA members employ the major share of the steamfitter work force in New York City and Nassau and Suffolk Counties, and the terms of the collective bargaining agreement negotiated between MCA and Local 638 prevail throughout the industry. Though there is no hiring hall for steamfitters in the New York area, there is sufficient uniformity of employment conditions, at least with respect to the employment of nonwhites, to support the conclusion that MCA is a proper party defendant in the Rios action.

The district court's decision in Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 311 F.Supp. 1002 (E.D.Pa. 1970), aff'd, 442 F.2d 159 (3d Cir. 1971), cited by MCA, held that an association of employers, as apart from its members, did not have standing to challenge a regulation issued by the Department of Labor known as the Revised Philadelphia Plan. MCA argues the same reasoning should apply here. The Court of Appeals, however, termed this holding "at least doubtful." Since the affected contractors were already before the court and since they had all been represented by the same attorney, the Court of Appeals found that "the presence or absence of the Association as a plaintiff [had] no practical significance." 442 F.2d at 166.

Similarly, in United States v. Bricklayers Local No. 1, et al., No. C.-71-65 (W.D.Tenn., filed November 29, 1972), the Court found that the Mason Contractors Association of Memphis, Inc. ("MCAM") was not a proper entity against which relief could be obtained because each of the twelve members of MCAM were also named individually as defendants.

In the present case, MCA has greater influence over and responsibility for employment practices applying to the industry as a whole than any single employer. Moreover, the participation of MCA in an affirmative action program is a necessity if the steamfitting industry is to correct the discriminatory effects of past employment practices.

Having found that MCA was properly made a party defendant in the Rios action, this Court, however, does not of course imply that MCA has been responsible *ipso facto* for all the employment practices here found unlawfully discriminatory or that it is liable in damages to the plaintiffs in Rios. Plaintiffs have shown no specific instances of MCA discrimination. Rather, plaintiffs have demonstrated only that there has been a lack of nonwhite employment in the industry generally and that, in consequence, the industry's referral practices must be changed. For the future, MCA will bear responsibility with Local 638 and JAC to take appropriate affirmative action to correct this situation.

Accordingly, MCA's motion to dismiss the Rios action as to it is denied.[17]

This disposition makes it unnecessary to consider the other grounds for relief urged by the Rios plaintiffs, particularly since little evidence was brought out at trial bearing on issues other than those presented by the Title VII claims.

Plaintiffs in *Rios* seek back pay on behalf of members of the class who can show they have been victims of past discriminatory practices (42 U.S.C. § 2000e-5(g)), and for costs and attorneys' fees (42 U.S.C. § 2000e-5(k)). These issues are reserved for later determination.

The foregoing constitutes the Court's findings of fact and conclusions of law. F.R.Civ.P. 52(a).

The Order and Judgment, in the form reviewed with the attorneys for all parties, is being filed herewith.

It is so ordered.

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[17] In view of the foregoing, it is unnecessary to decide if MCA was properly named as a defendant under 42 U.S.C. § 1981 or § 1983.

Date	Test	Passing Score	# White Applicants Taking Test	# (%) Whites Passed	# Black Applicants Taking Test	# (%) Blacks Passed	# Spanish Surnamed Taking Test	# (%) Spanish Surnamed Passed
4/4/67	Differential Aptitude, Form M—Verbal Reasoning, Numerical Ability, Mechanical Reasoning and Space Relation Tests	50% or higher	173	41(23.69%)	11	2(18.18%)	3	0
12/16/67	Scat 2A Multiple Aptitude Tests Applied Science and Mechanics Spatial Relations IID & IIID	50% or higher	188	44(23.40%)	31	1(3.22%)	7	1(14.2%)
7/20/68	Scat 2B Atkins Spatial I and II Survey of Mechanical Insight	50% or[1] higher	137	37(27%)	25	1(4.0%)	4	1(25.0%)
1/25/69	Henmon-Nelson Form B Bennett Mechanical Atkins Spatial	25% or[2] higher	157	100(63.69%)	16	2(12.5%)	3	0
1/31/70	Scat 2B Parts II and III Bennett Mechanical Form T Minnesota Paper Form Board AA	25% or higher	202	107(52.97%)	16	3(18.75%)	0	0
11/21/70	Bennett Mechanical Form S Multiple Aptitude Test—#8 Two Dimensions Differential Aptitude Test—Form in Verbal and Numerical	25% or higher	320	158(49.37%)	7	2(28.57%)	1	0
Totals			1177	487(41.37%)[3]	106	11(10.37%)	18	2(11.11%)

[1] In addition, eleven other applicants were offered admission to the program. Eight of these eleven were chosen on the basis of their cumulative score for all four parts of the exam, from amongst those who had achieved a score of 40th percentile or higher in each of the four components. In addition, three other individuals who had achieved a score of 30th percentile or higher on all four components were invited into the program. Consequently, 45 of the 137 white applicants (32.84%) and 4 of the 25 black applicants (16%) were invited into the program. For effect of this on overall total see footnote 3.

[2] In addition, fifteen other applicants were offered admission to the program. Thirteen of these fifteen were chosen on the basis of their cumulative score for all four parts of the exam, from amongst those who failed the examination. In addition, Messrs. Bright and Thomas were invited into the program. Consequently, 94 of the 157 white applicants (59.87%), 5 of the 16 black applicants (31.25%) and 2 of 3 Spanish surnamed applicants (66.66%) were invited into the program. For effect of this on overall total see footnote 3.

[3] Since additional persons were invited into the program (see footnotes 1 and 2), of the 1177 white applicants taking the test, 505 (42.90%) were invited into the program, of the 106 black applicants taking the test 17 (16.03%) were invited into the program, and of the 18 Spanish surnamed applicants taking the test 4 (22.22%) were invited into the program.

(A7644)

Order and Judgment of Bonsal, *U.S.D.J.*,
Dated June 31, 1973

UNITED STATES DISTRICT COURT

S. D. New York

June 21, 1973.

Nos. 71 Civ. 2877, 71 Civ. 847

United States of America,

Plaintiff,

—v.—

Local 638, Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Compressed Air, Ice Machine, Air Conditioning and General Pipefitters, *et al.*,

Defendants.

George Rios *et al.*,

Plaintiffs (Complainants),

—v.—

Enterprise Association Steamfitters Local Union #638 of U.A. *et al.*,

Defendants (Respondents).

Order and Judgment

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs shall have judgment against defendants as follows:

A. *Equitable Relief*

1. Defendant, Enterprise Association Steamfitters Local 638 of United Association of the Plumbing and Pipefitting Industry ("Local 638"), its officers, agents, employees and successors, are permanently enjoined from engaging in any act or practice which has the purpose or the effect of discriminating against any individual or class of individuals on the basis of race, color or national origin. They shall not exclude or expel from union membership, or limit, segregate or classify union membership, or fail or refuse to refer any individal for employment, on the basis of race, color or national origin, nor shall they take any other action which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment because of such individual's race, color or national origin. They shall receive and process applications for membership, admit members, train, test, refer for employment, handle grievances, and otherwise administer all of the affairs of Local 638 so as to ensure that no individual is excluded from equal work opportunities, including overtime and advancement, on the basis of race, color or national origin.

2. Defendant, Mechanical Contractors Association of New York ("MCA"), its officers, agents, employees, and successors, are permanently enjoined from engaging in any act or practice which has the purpose or the effect of discriminating against any individual or class of individuals on the basis of race, color or national origin. They shall not

fail or refuse to hire for employment any individual on the basis of race, color or national origin, nor shall they take any other action which would deprive or tend to deprive any individual of equal employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment because of such individual's race, color or national origin.

3. Defendant, Joint Steamfitters Apprenticeship Committee of the Steamfitters Industry ("JAC") its officers, agents, employees, and successors, are permanently enjoined from engaging in any act or practice which has the purpose or the effect of discriminating against any individual or class of individuals on the basis of race, color or national origin. They shall receive and process applications for the apprenticeship program, admit apprentices, train, test, refer for employment, graduate and otherwise administer the apprenticeship program so as to ensure that no individual or class of individuals is excluded from equal work opportunities on the basis of race, color or national origin.

B. *The Administrator*

4. Vincent McDonnell, Esq. is hereby appointed Administrator to implement the provisions of this decree and to supervise its performance. He shall immediately commence his duties.

5. In addition to the powers specified in this decree, the Administrator shall be empowered to take all actions, including the establishment of such additional record-keeping requirements as he deems necessary to implement the provisions and ensure the performance of this decree. The Administrator shall hear and determine all complaints

concerning the operation of this decree and shall decide any questions of interpretation and claims of violations of this decree, acting either on his own initiative or at the request of any interested person or party. All decisions of the Administrator shall be in writing, and shall be appealable to the Court.

Nothing contained herein shall give the Administrator the right to amend, modify or change the substantive terms of this decree, nor shall he have any power or authority other than that granted to him in this decree.

6. The compensation at a rate not to exceed $60 an hour and expenses of the Administrator shall be fixed by the Court, and shall be charged upon such of the defendants as the Court may direct.

7. The Administrator shall remain in office for an initial period of three years and thereafter shall remain in office for such time as the Court shall determine.

C. *Affirmative Action Program*

8. Within three months of the date of this decree, defendants Local 638, MCA and JAC shall jointly or separately if they are unable to agree, submit to the Administrator and the plaintiffs an affirmative action program. Said program shall be designed so that a sufficient number of black and Spanish-surnamed individuals (hereinafter referred to as "non-whites") will be admitted to full journeyman membership in Local 638's Construction Branch ("A branch") in order to achieve a minimum goal of 30% non-white membership by July 1, 1977. The Administrator shall set such minimum annual goals as he deems necessary in order to achieve the minimum goal of 30%. The affirmative actions program shall provide for periodic reports to the

Administrator indicating progress towards compliance with the above minimum goal.

9. To achieve the goal set out in paragraph 8, the affirmative action program shall be guided by the following provisions, except as modified by the Administrator with the approval of the Court, and shall include a direct A branch admission program, an apprenticeship training program, and other training as follows:

(a) *Direct Admission to the A Branch.* Individuals meeting the requirements of paragraph 11(a) and (b), infra, shall be admitted directly to A Branch membership and the defendants shall develop and implement, with the approval of the Administrator, an affirmative program of recruiting non-white journeymen. Any proposed changes in the procedures for admission shall be considered by the Administrator, who shall take all steps necessary to ensure equal employment opportunities for non-whites and any objection thereto shall be resolved by the Court.

(b) *Apprenticeship Training Program.* Pending achievement of the goals set out in paragraph 8, the apprenticeship program shall meet the following requirements:

(i) the program shall be four years in duration, subject to a recommendation by the Administrator for approval by the Court that a shorter period would be appropriate and aid in achieving the goals set forth in paragraph 8;

(ii) the Administrator shall determine the appropriate size and frequency of the apprenticeship classes each year. At least 30% of those indentured in each year for the years 1974 through 1977 shall be non-white subject to a determination by the Administrator that a greater percentage of non-white apprentices is necessary to achieve the goals set

out in paragraph 8. Such individuals shall be selected pursuant to the following standards:

a. *Age:* between 18 and 30 inclusive at the time of application.

b. *Criminal Records:* applicants' criminal records, if any, may not be considered unless an applicant has been convicted of job-related crimes, within five years prior to the date of application.

c. *Education:* High School diploma or its equivalent, subject to revision in the Affirmative Action program.

d. *Test:* tests validity in accordance with 29 C. F. R. §§ 1607 *et seq.*, or as may be specified in the Affirmative Action program, may be used to select apprentices.

(iii) The Administrator shall require appropriate publicity prior to the formation of each class, to inform non-whites of training, employment and union membership opportunities. To publicize the program, defendants shall also participate in career programs at local high schools in non-white areas.

(c) *Other Training.* (i) In the recruitment and training of non-whites, the defendants shall cooperate with the Department of Defense and any other appropriate governmental agency.

(ii) Defendants may propose and the Administrator may require a continuing training program for journeymen steamfitters who wish to develop their skills or specialties in the trade, available equally to white and non-white steamfitters.

10. Within 30 days after receipt of defendants' proposed affirmative action program, plaintiffs shall submit their

comments, if any, to the Administrator, who shall review all of the materials submitted to him, and, within 30 days after receiving plaintiffs' comments, shall submit to the Court an affirmative action program designed to achieve the purposes of this decree. Any objections to this program shall be resolved by the Court.

D. *Transitory Provisions*

Temporary Procedures for Direct Admission to the A Branch. 11. Following the issuance of this decree, and for the first 3 months following the adoption by the Court of the practical examination referred to in paragraph 13, *infra* — unless extended by the Court upon application of any of the parties—Local 638 shall admit as full journeyman members of its A branch only graduates of the apprentice program and non-whites who apply in writing and who meet the following conditions:

(a) 4 years' experience which shall include experience obtained in the United States or elsewhere, in Local 638's B branch, or in construction or maintenance plumbing, pipefitting or welding as an employee of a union or non-union contractor, or other employment reasonably related or similar to steamfitting work, including experience in the Armed Forces and vocational training related to the skills of a journeyman steamfitter; and either

(b) successful completion of a practical examination administered by a board of three examiners who shall act by majority vote, consisting of the Administrator or his representative, a representative from the union and one chosen by the Administrator from either the Recruitment and Training Program, Inc., or Fight Back (hereinafter "minority referral sources") or

(c) certification by an employer who is a party to the present collective bargaining agreement with Local 638 that such non-white has been performing construction steamfitting work for at least six weeks within the territorial jurisdiction of Local 638 and is a competent steamfitter.

Applicant's criminal record, if any, may not be considered unless an applicant has been convicted of job-related crimes, within five years prior to the date of application.

There shall be no qualifications for membership in the A branch other than those set forth above, and the payment of an initiation fee as described in paragraph 15.

All disputes with respect to admission of members shall be heard and determined by the Administrator. Any proposed changes in the procedures for admission to the A branch shall be considered by the Administrator, who shall take all steps necessary to ensure equal employment opportunities for non-whites. Any objections to changes in the admissions procedures, if any, instituted by the Administrator shall be resolved by the Court.

12. Following the expiration of the period in paragraph 11 above, until the effective date of the affirmative action program, Local 638 shall admit as full journeymen members of its A branch whites and non-whites, on a one-for-one basis who meet the conditions set forth in paragraphs 11(a) and (b). The number of non-whites admitted under paragraph 11—up to 250—shall be includable in this figure. Any proposed changes in these interim procedures shall be considered by the Administrator and approved by the Court.

13. Within 5 days of the date of this decree, defendants MCA and Local 638 shall submit to the Court, with copies to the parties, a practical examination for admission of journeyman steamfitters to the A branch. Within 5 days thereafter, plaintiffs shall submit comments and/or a separate proposed practical examination. The Court shall adopt a practical examination and shall inform the parties of the contents thereof. Said practical examination shall be job-related. It shall be administered within 45 days of the date of this decree, and at least once every month thereafter. At least three weeks prior to administering each examination, Local 638 shall give to the Administrator, to each applicant, to the minority referral sources and to the New York City Manpower and Career Development Agency written notice by first class mail of time and place of the examination, as well as a description of the nature of the examination and of the kinds of tasks to be performed.

14. Examinations shall be graded by the board of examiners, acting by majority rule, and the applicants shall be advised of the results by first class mail within 20 days from the date of the examination. A report containing the name, address, and race, color or national origin of the individual taking the examination, and whether he passed or failed, shall be served on the plaintiffs within 20 days after each examination is given. Failure on an examination shall not prejudice an applicant's right to retake it at six months intervals, nor shall such individual suffer any change in his employment status or work referrals because of his failure to pass the membership examination, and such applicants shall be so notified.

15. Within thirty days of the date when the applicants are advised of the results of the examination, all qualified applicants who passed shall be accorded full journeyman status and issued temporary membership cards in the A

branch. Upon receipt of such cards, such persons shall commence payment to Local 638 of an initiation fee in the amount of $800, payment to be made over a period of eight months, following which permanent membership books will be promptly issued.

Temporary Procedures for the Apprenticeship Training Program. 16. During 1973 there shall be a minimum of 400 apprentices, of whom 175 shall be non-white, indentured into a program of no more than 4 years, chosen in an impartial manner from the list of qualified apprenticeship applicants selected as of the date of the decree. If the JAC wishes to indenture a larger number of applicants into the program it shall do so on the basis of one non-white for every white so indentured. Applicants' criminal records, if any, may not be considered unless an applicant has been convicted of job-related crimes within five years prior to the date of the application.

Defendants shall use their best efforts to provide apprentices with not less than 1750 hours per year of reasonably continuous employment.

The Administrator shall hear and determine all disputes relating to an applicant's qualifications and whether or not apprentices have successfully completed the apprenticeship program.

Publicity

17. Until the affirmative action program is adopted by the Court, defendants shall regularly publicize in the minority media, and in such other media as the Administrator shall require, the employment and membership opportunities available under this decree, and the procedures for taking advantage of such opportunities. The text of the

materials used for this publicity shall be furnished to the plaintiffs and the Administrator.

E. *General Provisions*

Work Referral. 18. Defendants shall provide qualified non-white steamfitters with assistance in obtaining and retaining employment.

19. Local 638 and MCA shall use their best efforts to maintain at their respective offices during normal business hours a register setting forth (a) all current construction jobs and (b) all prospective jobs which are expected to begin during the ensuing six months in Local 638's territorial jurisdiction. These registers, which shall be updated at least once a week, shall contain available information as to contractor's name and address, address of job site, name of job superintendant and steamfitter foreman, expected duration of job and number of steamfitters employed and estimated numbers to be employed on the job. These registers shall be known to all persons seeking construction steamfitting work in the territorial jurisdiction of Local 638, whether or not they are union members.

20. Local 638 shall maintain at its offices a list of all qualified non-whites who contact the union seeking construction steamfitting work in its territorial jurisdiction, whether or not they are union members. This list, which shall be updated at least once a week, shall contain the name, address, telephone number and union affiliation, if any, of each such person, and will indicate whether each person specializes in any aspect of the trade, e.g., welding. Local 638 shall furnish a copy of this list each week to MCA and to the Administrator.

21. In the event that MCA, or any individual employer (whether or not a member of MCA) requests the union to send it construction steamfitters, at least 25% of the persons referred by the union shall be qualified non-whites selected on a first-come first-served basis from the current list. In the event that the number of persons on the list is inadequate to meet the above requirement, the union shall refer all non-whites on said list and any other available persons. The union shall record each such request for steamfitters, including the date, name of contractor, job site, number of steamfitters requested and number referred. The union shall also record the names and addresses of the non-whites referred. Copies of said records shall be supplied monthly to the Administrator.

22. The Administrator shall conduct an investigation of the present work referral system, the transfer of work crews from job site to job site, and its effects upon the employment opportunities of non-whites, and within one year of the date of this decree, he shall submit to the parties and the Court such recommended changes, if any, in the work referral system that he feels are necessary to ensure that non-whites receive equal employment opportunities.

In order to accomplish the objectives of this paragraph, the Administrator may require such reports as he deems necessary, including reports indicating the duration of employment, earnings, reasons for layoffs, race and other relevant information.

Defendants shall use best efforts to ensure that records of the Steamfitters Industry Security Benefit Fund, Welfare Fund, Pension Fund, Vacation Plan and Education Fund are available upon request of the Administrator.

23. At any time, any of the parties hereto may apply to the Administrator and then to the Court for the purpose of seeking additional orders to ensure non-discriminatory referrals of construction steamfitters for employment.

Back Pay. 24. The issue of back pay will be reserved for subsequent decision by the Court.

Attorney's Fees. 25. The issue of attorney's fees will be reserved for subsequent decision by the Court.

Costs. 26. The issue of costs will be reserved for subsequent decision by the Court.

Class. 27. The two distinct classes in the *Rios* case, as determined in the Order of Judge Tenney, dated August 10, 1971, comprise:

(a) All Negro and Spanish Sur-named Americans residing in New York City and the Counties of Nassau and Suffolk in the State of New York who now or at any time in the future have the skills necessary to work as journeymen steamfitters; and

(b) All Negro and Spanish Sur-named Americans residing in New York City and the Counties of Nassau and Suffolk in the State of New York who now or at any time in the future are capable of learning such skills and who wish to obtain access to steamfitting work in New York City and said Counties.

Continuing Jurisdiction. 28. This Court shall retain jurisdiction over this action to ensure compliance with the terms of this judgment and to enter such additional orders as may be necessary to effectuate equal employment opportunities.

Opinion and Judgment of the United States Court of Appeals for the Second Circuit Dated June 24, 1974

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 647, 834—September Term, 1973.

(Argued March 12, 1974 Decided June 24, 1974.)

Docket Nos. 73-2110, 73-2266

GEORGE RIOS, et al.,

Plaintiffs-Appellees,

—against—

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., et al.,

Defendants-Appellants.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., et al.,

Defendants-Appellants.

Before:

HAYS and MANSFIELD, *Circuit Judges,* and DAVIS, *Judge.**

* Of the United States Court of Claims, sitting by designation.

Appeal from an Order and Judgment of the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge,* in consolidated actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, directing appellants to achieve prescribed percentages of "non-white" membership in the Union and in a joint employer-union apprenticeship program.

Remanded for recalculation of the percentage goal for non-white Union membership. Subject to such modification as may be made by the district court, the Order and Judgment are affirmed.

RICHARD BROOK, ESQ., New York, N.Y.(Ernest Fleischman, Esq., Delson & Gordon, New York, N.Y., of counsel), *for Defendant-Appellant Enterprise Association Steamfitters Local 638 of U.A.*

DENNIS R. YEAGER, ESQ., New York, N.Y. (E. Richard Larson, Esq., Marilyn R. Walter, Attorney, New York, N.Y., of counsel), *for Plaintiffs-Appellees George Rios, et al.*

JOEL B. HARRIS, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York, Steven J. Glassman, Assistant United States Attorney, New York, N.Y., of counsel), *for Plaintiff-Appellee United States of America.*

MANSFIELD, *Circuit Judge:*

Once again we are confronted with questions arising out of the imposition of a specific racial membership goal upon a union as a means of dissipating the effects of its past discrimination against minority applicants for membership.

See, e.g., *United States* v. *Wood, Wire & Metal Lathers International Union, Local Union No. 46*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973). The present appeal is by Local 638, Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Compressed Air, Ice Machine, Air Conditioning and General Pipefitters (the "Union") from certain provisions of an Order and Judgment entered on June 21, 1973, after the consolidated trial of two actions in the Southern District of New York before Judge Dudley B. Bonsal, sitting without a jury. The portions of the Order appealed from relate to the admission of "non-whites" into Union membership and into a joint employer-union apprenticeship program. The term "non-white" as so used is defined to mean black and Spanish sur-named workers. We remand the case for the purpose of reestablishing the percentage goals upon the basis of relevant statistical data. Subject to such modification the Order and Judgment are affirmed.

Two actions were consolidated for trial purposes by the district court. One is a suit filed by the government in 1971 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, against the Union and others to enjoin a pattern and practice of discrimination against non-whites in the construction industry. Joined as defendants were (1) several local construction unions, including Local 638, each of which represents a different branch of workers in the industry, (2) joint apprenticeship committees for the different branches, and (3) various associations of employers in the industry. Separate trials were ordered of the claims against each Union. On January 3, 1972, after a three-day hearing on the government's application for preliminary injunctive relief, Judge Bonsal found that the Union had unlawfully discriminated in the past against non-whites, failing among other things to admit some 169 qualified non-white workers to membership. 337 F. Supp. 217 (S.D.N.Y. 1972). He ordered the Union to admit them and temporarily enjoined a strike protesting an employer's non-discriminatory action in laying off white and non-white workers when the work force was reduced upon the completion of a construction job. No appeal was taken from his findings, conclusions or order.

The government's suit against the Union was consolidated for trial purposes with a class action against the Union and others by four non-white workers (known as the *"Rios"* action) claiming that the Union, the Mechanical Contractors Association of New York, Inc. ("MCA") and the Joint Steamfitters Apprenticeship Committee of the Steamfitters Industry ("JAC") had failed to admit non-whites to membership, had refused non-whites access to the steamfitters' apprenticeship program on the same basis as whites, and had failed to provide non-whites with equal job opportunities, all in violation not only of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, but also of 42 U.S.C. §§1981 and 1983, and of the Fifth and Fourteenth Amendments. Prior to the consolidation of the *Rios* and government suits Judge Frankel, after hearing the application of the *Rios* plaintiffs for preliminary injunctive relief in their action, found, in an opinion filed on March 24, 1971, 326 F. Supp. 198, that the Union "ha[d] followed a course of racial discrimination over the years," which had had the effect, among others, of wrongfully excluding three of the plaintiffs from membership in the Union. By way of preliminary relief the Union was ordered to admit the three to membership. No appeal was taken by the Union from this preliminary injunction.

Following the consolidated trial Judge Bonsal, in detailed findings and conclusions issued on June 21, 1973, 360 F. Supp. 979, found that, although the Union had

taken some affirmative action since the entry of the preliminary injunction to increase non-white participation in the construction industry (principally by joining in a joint industry program called the "New York Plan," which sought to recruit and find jobs for minority employees), it had continued its pattern and practice of discrimination against non-whites by failing to admit them to full journeyman status, by discriminating against them in work referral, and by participating in an apprenticeship program which discriminated against them.

In an Order and Judgment filed with his opinion the district judge enjoined the defendants from discriminating against individuals on the basis of race, color or national origin and directed the Union to receive and process applications for membership and references for employment and to administer its affairs in a nondiscriminatory manner. The Order appointed an Administrator, Vincent McDonnell, Esq., to implement its provisions and to supervise performance by the parties. The defendants were directed, within three months of the date of the Order, to submit to the Administrator an "affirmative action program" designed to secure the admission of a sufficient number of non-whites to membership as journeymen in the Union's A Branch "to achieve a minimum goal of 30% non-white membership by July 1, 1977." (Members of the Union's "A Branch" perform construction steamfitting work and generally receive higher hourly earnings than do members of the "B Branch," who perform shop or repair work.) With a view to achieving the prescribed 30% goal, guidelines were established for direct admission to the A Branch membership and for the administration of the apprenticeship program, subject to such changes as might later be approved by the Administrator and the court.

The Order further directed that, during the three-month period following its issuance, certain "Transitory Provi-

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sions" were to be observed by the Union. During this period the Union was directed to admit only (1) graduates of the Apprenticeship Program and (2) non-whites who had met certain experience or certification requirements or who had successfully completed a practical examination to be administered by a Board of Examiners. The Board, which was authorized to act by majority rule, consisted of the Administrator or his representative, a representative of the Union, and one chosen by the Administrator from a "minority referral" source. The Order required the defendants, within five days after its effective date, to submit a form of such practical examination for approval by the court and to administer the examination once a month, after such approval, giving advance notice to each applicant.

The Order further established temporary procedures for an apprenticeship training program during the period prior to adoption by the court of the "affirmative action program." It specified that during 1973 there should be a minimum of 400 apprentices, of whom 175 should be non-white, indentured into a program not to exceed four years. Any additional apprentices must be indentured on the basis of one non-white for every white.

The parties submitted to the Administrator their proposals for and comments with respect to an "affirmative action program" that would incorporate permanent relief with respect to admissions to membership and administration of the apprenticeship program. On March 29, 1974, the district court adopted an "Affirmative Action Plan" (the "Plan"), which generally implements the terms of the court's Order. The Plan continues Mr. McDonnell in office as Administrator until July 31, 1977, and directs that the minimum goal of 30% non-white membership in the A Branch shall be achieved in stages, 15% by July 15, 1974, 20% by July 15, 1975, 25% by July 15, 1976 and 30% by

July 1, 1977. The categories of A Branch members to be used as the measure for determining these goals are defined, with the direction that the goals are to be met through (1) a four-year apprenticeship program, (2) direct admission to the A Branch, and (3) other trainee programs. Detailed standards and conditions are fixed for admission of non-whites to the first two of these categories, the Plan directing that a minimum of 100 non-whites shall be indentured into the apprenticeship program each year through 1977 and that a practical examination for admission to the A Branch shall be given weekly or at such other intervals as are approved by the Administrator, upon at least two weeks notice to applicants. The three-person Board of Examiners, which is authorized to act by majority vote and to determine the results of each examination, is to consist of the Administrator or his representative, a Union representative and a representative of the "non-white community" chosen by the Administrator. The Union and employers are also encouraged to develop and participate in non-white trainee programs. Aside from the foregoing, perhaps the most significant term of the Plan is its provision that if the Administrator determines that the minimum goals may not be met by the foregoing methods he may require direct admission to the A Branch on terms approved by himself and the court.

No appeal has been taken from the district court's findings and conclusions or from most of the provisions of the Order and Judgment, including the broad equitable relief granted, the appointment of the Administrator, the definition of his powers, and the general provisions with respect to work referral, back pay, attorneys' fees, costs and continuing jurisdiction. The Union, however, appeals from six specific provisions of the Order:

(1) its provision for an affirmative action program (since adopted) to achieve a minimum goal of at least 30% non-white membership by July 1, 1977 (Par. 8);

(2) its grant of authority to the Administrator to determine the size and frequency of apprenticeship classes and requirement that at least 30% of those indentured for each year for the year 1974 through 1977 shall be non-white, subject to a determination by the Administrator that a greater percentage of non-white apprentices may be necessary to achieve the minimum 30% goal (Par. 9(b)(ii));

(3) its provision that during the three-month transitory period following entry of the Order non-white applicants for membership might satisfy the four years experience requirement by including their experience in specified work of a related nature (Par. 11(a));

(4) its establishment of a board of three examiners who are authorized, by a majority vote, to administer the practical examination to be given to applicants;

(5) its provision that from the expiration of the three-month transitory period until the adoption of the affirmative action plan applicants for full journeyman membership in the A Branch must be accepted on a "one-for-one" basis, i.e., one non-white for each white (Par. 12);

(6) the requirement that the practical examination be administered "at least once every month" (Par. 13).

Since the facts are set forth in detail in Judge Bonsal's opinion, 360 F. Supp. 979, we limit ourselves to a summary of those aspects essential to consideration of the Union's challenge of the foregoing provisions.

The Union is a labor organization representing its members as their collective bargaining agent in arriving at terms and conditions of employment with steamfitting contractors and contractor-associations in the five boroughs of New York City and in Nassau and Suffolk Counties. It has two branches: (1) the A Branch, whose members are journeymen engaged in construction work on building sites, and (2) the B Branch, a metal trades division, whose members work in shops or perform repair work. Membership in the Union is of substantial aid to a worker in obtaining a job as a construction steamfitter and in gaining advancement and overtime pay. Although the Union does not operate a hiring hall, it does refer workers to jobs upon learning of openings. Contractors in the steamfitting industry maintain steady crews which are shifted from site to site as construction needs change. Workers and the Union learn of job openings through those employed on different sites or through employers' foremen or superintendents.

All past and present officers and business agents of the Union have been white. Prior to 1967 there were no non-white journeymen in the A Branch. By the end of 1971, there were 3,850 A Branch members, of whom only 31 were non-white, and by the end of 1972 approximately 4.5% of the membership, or 191 out of 4,198 A Branch members, were non-white. For the most part even this small non-white membership was achieved as a result of the preliminary relief granted by the court. Until that time the Union's use of irregular and informal admissions procedures had resulted in almost complete and systematic exclusion of non-white applicants for journeyman membership, while whites were admitted, with some preference apparently given to relatives of existing members. Approximately 25% of the A Branch have been admitted through a five-year apprenticeship program administered

by the JAC, the members and employees of which are all white. As a result of the JAC's use of discriminatory requirements for admission into the program, no non-white applicants were admitted prior to 1964 and, since that time, of 492 apprentices indentured 94.3% have been white. At the time of trial only 16 of the 376 participants in the apprenticeship program were non-white.

The district court concluded that it was unnecessary to determine whether the Union had engaged in purposeful discrimination against admission of non-whites to the A Branch since the Union had a history of *de facto* discrimination, with the results of past discrimination being perpetuated. In short, non-white access to membership, either directly or through the apprenticeship route, has been almost completely blocked until the last two years when a very small percentage of non-white membership has been achieved, but otherwise the effects of past discrimination have continued. As against the miniscule percentage of non-white members in the Union, reliable statistical sources revealed that blacks and Puerto Ricans constituted (1) 25.09% of the total population in the seven counties in which the Union has jurisdiction,[1] and (2) 19.79% of the work force in that area.[2]

In light of the foregoing background, described in detail in his opinion, Judge Bonsal concluded that affirmative relief was required to combat the continuing effects of past discriminatory practices, and entered the Order and Judgment forming the subject of the present appeal.

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1 The population statistics are taken from U.S. Department of Commerce, *General Social and Economic Characteristics, 1970 Census of Population—New York* (PC(1)-34N.Y.), Appendix 525, *et seq.*

2 Based on Tables from *General Social and Economic Characteristics, 1970 Census of Population—New York* (PC(1)-34N.Y.) and excerpts from Table 35, *General Population Characteristics, 1970 Census of Population—New York* (PC(L)-B34 Exch. U-AV).

DISCUSSION

Appellants argue that the court's imposition of a racial goal[3] violates §703(j) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(j), and the Due Process and Equal Protection Clauses of the Constitution. However, we have recently considered and rejected the same arguments in similar cases, see, e.g., *United States* v. *Wood, Wire and Metal Lathers International Union, Local 46*, 471 F.2d 408, 412-13 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *Vulcan Society of New York City Fire Department, Inc.* v. *Civil Service Commission*, 490 F.2d 387, 398-99 (2d Cir. 1973); *Bridgeport Guardians, Inc.* v. *Members of Bridgeport Civil Service Commission*, 482 F.2d 1333, 1340-41 (2d Cir. 1973), and nothing has been advanced that would lead us to depart from the principles of those decisions, which directly apply here.[4]

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3 We use "goal" rather than "quota" throughout this opinion for the reason that while to some the two words may be synonymous, the term "quota" implies a permanence not associated with "goal." For our purposes the significance of the distinction lies in the fact that once a prescribed goal is achieved the Union will not be obligated to maintain it, provided, of course, the Union does not engage in discriminatory conduct.

4 In his dissent Judge Hays disputes the force of the earlier decisions of this court. He maintains, for example, that our approval in the *Wood, Wire & Metal Lathers* case of hiring goals turned solely upon the fact that the union had waived any objection under §703(j) by agreeing to settle the action brought by the Government under Title VII. This court did indeed attach significance to the fact of the settlement, but nonetheless felt obliged to consider the settlement provisions in light of Title VII. We concluded that the goal did not "do violence to the intent of the Act," precisely because it was designed to correct past discriminatory practices. 471 F.2d at 413.

My Brother, Judge Hays, is correct in noting that *Vulcan* Society and *Bridgeport Guardians* are civil rights cases brought under §1983. But their force is not as easily contained as he would have us believe. Indeed, in *Bridgeport Guardians* we accepted and relied upon the proposition that Title VII did not prohibit goals aimed at curing past discrimination as support for the use of such goals in a §1983 case.

Once a violation of Title VII is established, the district court possesses broad power as a court of equity to remedy the vestiges of past discriminatory practices. See *United States* v. *Wood, Wire and Metal Lathers International Union, Local 46, supra*, and cases cited therein at p. 413. The Civil Rights Act of 1964 provides that upon finding that a respondent has engaged in an unlawful employment practice the court has the authority not only to enjoin continuation of the practice but also to order "affirmative action" which may include such "equitable relief as the court deems appropriate," 42 U.S.C. §2000e-5(g). The Act further empowers the Attorney General, in a civil suit (such as that instituted here against the Union) which charges a pattern or practice of discrimination, to seek such relief against the defendants "as he deems necessary to insure the full enjoyment of the rights herein described," 42 U.S.C. §2000e-6(a). "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971). In addition to the powers expressly granted by the Civil Rights Act, the court possesses the equitable power, upon finding any unlawful discrimination, to "eliminate the discriminatory effects of the past as well as bar like discrimination in the future," *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965).

Eight circuits, including our own, have construed this delegation of broad equitable power as authorizing the district court to establish goals for the purpose of remedying the effects of past discriminatory conduct. See *United States* v. *Wood, Wire and Metal Lathers International Union, Local 46, supra; Associated Gen. Contractors of Mass. Inc.* v. *Altshuler*, 361 F. Supp. 1293 (D. Mass)., *aff'd.*,

490 F.2d 9 (1st Cir. 1973), *cert. denied*, 42 U.S.L.W. 3593 (April 23, 1974); *Pennsylvania* v. *O'Neill*, 473 F.2d 1029 (3d Cir. 1973) *(en banc)*; *Contractors Assn. of Eastern Pa.* v. *Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); *Morrow* v. *Crisler*, —— F.2d —— (5th Cir. Mar. 27, 1974), Slip Opin. 2068 at 2078-79; *Local 53 Asbestos Workers* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969); *United States* v. *Local 212, IBEW*, 472 F.2d 634 (6th Cir. 1973); *United States* v. *IBEW Local 38*, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); *United States* v. *Carpenters Local 169*, 457 F.2d 210 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *United States* v. *Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).[5] Despite the existence of some tension between the constitutional mandate of non-discrimination, on the one hand, and the use of goals as a kind of "reverse

5 Judge Hays' dissent argues that many of these cases do not in fact support the use of quotas against the prohibitions of Title VII. The dissent points, for example, to the fact that the *Contractors Association* case and the *Associated General Contractors* case involve quotas prescribed by an Executive Order, not by a Title VII action. But the court in *Contractors Association* concluded that "the Executive is bound by the express prohibitions of Title VII" and went on to rule that quotas did not violate the prohibition of §703(a). 442 F.2d at 171-72. Consistent with this approach, the First Circuit in *Associated General Contractors* cited as support for its holding endorsing the Executive Order those cases that had upheld quotas against challenges under §703(j). 490 F.2d at 16-17, 20-21.

The dissent maintains that the court in *Carpenters Local 169* stopped short of ordering fixed racial quotas. Closer inspection reveals the opposite to be the case. In *Carpenters Local 169* the Seventh Circuit ordered the district court to fashion a decree directing the defendant unions to issue permits to blacks trained pursuant to the Ogilvie Plan. Elsewhere the Seventh Circuit has upheld against §703(a) and (j) challenge the training provision of the Ogilvie Plan which requires a minimum ratio of 1 trainee (blacks) to 4 journeymen (whites) in the union program. *Southern Illinois Builders Ass'n* v. *Ogilvie*, 471 F.2d 680, 684-86 (1972).

discrimination," on the other,[6] the Supreme Court has recognized that "mathematical ratios," although forbidden if specified as a permanent or "inflexible requirement," may serve as a "useful starting point in shaping a remedy to correct past constitutional violations," *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 25 (1971).

At first blush a court-ordered racial goal might appear to violate the language of §703(j) of the Civil Rights Act which provides that the Act shall not be interpreted to require an employer "to grant preferential treatment to any individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . in comparison with the total number or percentage of persons of such race . . . in any community."[7] However, as we indicated in *United States v. Wood, Wire and Metal Lathers International Union, Local 46, supra*, that language was intended to bar prefer-

6 *DeFunis* v. *Odegaard*, —— U.S. ——, 42 U.S.L.W. 4578 (April 23, 1974), which involves the constitutionality of preferential law school admissions, is clearly distinguishable, since that case does not involve the use of quotas to eradicate past discrimination. Moreover, unlike the entering class in the law school which had a fixed number of places, the Union does not have a set or maximum number of members.

7 The full text of §703(j) reads as follows:

"Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

ential quota hiring as a means of changing a racial imbalance attributable to causes other than unlawful discriminatory conduct. It does not prohibit the use of goals "to eradicate the effects of past discriminatory practices." Our interpretation has been shared by others. See, e.g., *United States* v. *Ironworkers, Local 86,* 443 F.2d 544, 553-54 (9th Cir.), *cert. denied,* 404 U.S. 984 (1971); *Contractors Assn. of Eastern Pa.* v. *Secretary of Labor,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971); *United States* v. *IBEW, Local 38,* 428 F.2d 144, 149-50 (6th Cir.), *cert. denied,* 400 U.S. 943 (1970) (". . . that section [§703(j)] cannot be construed as a ban on affirmative relief against continuation of past discrimination . . . . Any other interpretation would allow complete nullification of the stated purposes of the Civil Rights Act of 1964.").

Where a racial imbalance is unrelated to discrimination, §703(j) recognizes that no justification exists for ordering that preference be given to anyone on account of his race or for altering an existing hiring system or practice. But where the imbalance is directly caused by past discriminatory practices it is readily apparent that if the rights of minority members had not been violated, many more of them would enjoy those rights than presently do so and that the ratio of minority members enjoying such rights would be higher. No longer are we dealing with an "imbalance" attributable to non-discriminatory causes. The effects of such past violation of the minority's rights cannot be eliminated merely by prohibiting future discrimination, since this would be illusory and inadequate as a remedy. Affirmative action is essential. Since the nature and extent of such action depends on the facts of each case, it must of necessity be left to the sound discretion of the trial judge, who may in one case find that broad equitable relief will suffice to restore the balance but in another conclude that use of a more specific remedy is required.

Appellants further argue that while such goals may be permissible in the field of public employment they should be barred as a means of curing past discrimination in private enterprise. No rational basis is offered for drawing such a distinction. That private violations of civil rights should be remediable has been recognized at least since the enactment of the Civil Rights Act of 1866, 42 U.S.C. §1981. Since the harm caused by private violations can be at least as serious as that resulting from conduct of public bodies or officials, the relief must be commensurate with the injury to be remedied.

Nor are remedial goals limited to any specific or prescribed form. The precise method of remedying past misconduct is left largely to the broad discretion of the district judge. Goals have been expressed in terms of specific numbers or ratios, *United States* v. *Wood, Wire and Metal Lathers International Union, Local 46, supra* (minimum of 100 work permits to be issued to non-whites; 250 permits to be issued annually on a "one-to-one" basis, black to white, through 1975); *Vulcan Society* v. *Civil Service Commission, supra* (ratio of 3 whites to 1 minority candidate established for a specific period); *Carter* v. *Gallagher,* 452 F.2d 315, 331 (8th Cir. 1971) *(en banc), cert. denied,* 406 U.S. 950 (1972) (1 minority fireman for every 2 whites hired); *Pennsylvania* v. *O'Neill,* 348 F. Supp. 1084 (E.D. Pa. 1972), *modified en banc,* 473 F.2d 1029 (3d Cir. 1973) (1 black for every 2 whites hired), or percentages, *Bridgeport Guardians* v. *Bridgeport Civil Service Commission, supra* (specific numbers of minority patrolmen to be appointed in order to achieve 15% goal). Goals have also been mandated with respect to apprenticeship programs, *United States* v. *Ironworkers Local 86,* 443 F.2d 544 (9th Cir.), *cert. denied,* 404 U.S. 984 (1971) (union ordered to recruit 30% black apprentices, with minimum number per year).

Applying these principles here, the undisputed facts justified the district court's grant of more drastic relief than a mere prohibition against future discriminatory conduct on the Union's part. The court's findings, which are not controverted, disclose a pattern of long-continued and egregious racial discrimination which permeated the steamfitting industry, precluding qualified non-white applicants from gaining membership in the Union's A Branch and maintaining it as a "white" union. The Union has failed completely to demonstrate that its discriminatory practices could be justified on legitimate grounds such as safety considerations or the high level of skill required of Union members. Nor has the Union, despite the opportunity afforded after the issuance of preliminary relief, voluntarily "cleaned house" or taken any meaningful steps to eradicate the effects of its past discrimination. Under the circumstances the imposition of remedial goals was not an abuse of discretion.

There remains the question whether the 30% goal fixed by the court exceeded the bounds of its discretion. In considering that issue we must be guided by the principle that the objective of a remedial quota is a limited one. It seeks to place eligible minority members in the position which the minority would have enjoyed if it had not been the victim of discrimination. Of course any attempt to reconstruct what would have happened in the absence of discrimination is fraught with considerable difficulty. But the court is called upon to do the best it can with the data available to it. *Cf. Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946). In the present case it is undisputed that a certain percentage of the total labor force within the Union's territorial jurisdiction would, in the absence of discriminatory practices, have been eligible for membership in the Union's A Branch, either directly or through the apprenticeship program. The district court apparently

concluded that 30% of the membership would have been non-white, absent discriminatory practices. The record is unclear as to the source of the 30% figure. The trial judge's comments at one point during the proceedings indicate that the figure was prompted by regulations recently proposed by the Deputy Mayor-City Administrator of the City of New York, which set a goal of 28% "minority" steamfitters to be reached by June 30, 1977.[8] However, this proposed figure (which is not part of the record below) was based on a definition of the term "minority" which includes not only Negroes and Spanish sur-named Americans but Orientals, American Indians and, where appropriate, females and other classes of individuals which have been the subject of past discriminatory practices. The City's proposal was also based on the minority composition of the five boroughs of New York City, whereas we are here dealing with a larger area which includes, in addition, Nassau and Suffolk where the non-white percentage of the population is smaller than in New York City. The district court's opinion further indicates that the selection of the 30% goal may also have been influenced by statistics taken from the 1970 census, which "indicate that non-whites constitute approximately 25.09% to 30.06% of the total population of New York City and Nassau and Suffolk Counties," 360 F. Supp. at 992. The membership

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8 In opening a hearing held on April 26, 1973, with respect to the proposed Order the court stated (Tr. pp. 3-4):

> "The second part of the decree, as I envision it, would be an affirmative action program. I was rather taken by the proposed ordinance in the City of New York and the proposed executive order of the Mayor on this general subject two weeks ago. I rather think that idea will probably be enacted and so that is going to mean, I take it, throughout this industry, whether we do it in this case or not, that the employers and the unions who are in the construction industry are sooner or later going to have to come out with some kind of an affirmative action program, at least if they are going to do city work, and I assume they want to do city work."

of the A Branch, however, is not drawn from the entire population. It has consisted of male workers over 18 years of age. Women have never sought to become steamfitters. See opinions of Judge Frankel in *Rios*, 326 F. Supp. at 202, and of Judge Gurfein in *United States* v. *Local 638 Enterprise Association*, 347 F. Supp. at 174 n.4. Persons under 18 years of age, white or non-white, do not appear to have been admitted into the Union or into the apprenticeship program. Absent racial discrimination, therefore, the non-white members of the Union would have been drawn from the male work force over 18 years of age in the Union's jurisdiction.

Statistics as to the population of this work force during the pertinent period should provide a more accurate base than total population statistics for determining what would have been the percentage of non-white membership, absent discrimination, in the Union. The record reveals that such figures were made available to the district court in May 1973 before its decision and were accepted by it. These figures appear in tables published by the United States Department of Commerce in a publication entitled *General Social and Economic Characteristics, 1970 Census of Population—New York*, which show that 19.79% of the total labor work force over 16 years of age in the area over which the Union has jurisdiction consisted of black and Puerto Rican males. These figures are not perfect for present purposes, since they do not include all Spanish sur-named persons, they do include some persons under 18 years of age, and they do not give the percentages for other years during the period of the alleged discrimination. However we believe that reliable statistics with respect to the *labor force* provide a more accurate basis for arriving at an appropriate non-white percentage goal than does the information relied upon by the district court, which included not only males forming the labor force, but females, children, retired persons and others who would not, absent discrimination, have been the source of Union members or apprentices.

Judge Bonsal did recognize that it might be necessary to change the 30% figure "if during the course of the next four years it turns out that the population figures don't justify it" (Appendix 388). However, we believe that from the outset the court should be guided by the most precise standards and statistics available in view of the delicate constitutional balance that must be struck in the use of such goals or quotas between the elimination of discriminatory effects, which is permissible, and the involvement of the court in unjustifiable "reverse racial discrimination," which is not. See *United States* v. *Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971). These conflicting considerations make it essential that the percentage figure be reached with the utmost of care, since once the goal is reached the party will thereafter be bound by standards of non-discrimination applicable to all and not forced to continue in effect a percentage ratio that could become anachronistic. The district court's role in prescribing non-white goals must at all times be limited to eradication of past discrimination. To prescribe a goal based on an anticipated future increase in the non-white percentage of the population or of the work force would be to cross the line from lawfully remedying the effects of past discrimination to an unlawful attempt to maintain a future non-white percentage.

In view of the district court's apparent reliance upon figures of questionable relevance and its failure to define the basis for the 30% goal, we remand for reassessment of the percentage goal figure. Upon remand the district court may, for reasons articulated by it, satisfactorily explain the rationale for its 30% goal or it may conclude that a lower percentage is appropriate.

We find no merit in the other points raised by appellants. Their argument that the percentage goal fixed by the court will create unemployment is at best speculative and ignores the necessity of curing the effects of past discrimination by providing equal work opportunities to the non-white minority. Furthermore, should the 30% figure be reduced upon remand, any unemployment threat would, of course, be proportionately alleviated. Since the three-month period following the district court's Order has expired and an affirmative action plan has been adopted by the court, appellants' attack on interim measures prescribed by the Order (see Pars. 11(a) and 12) has been rendered moot, at least insofar as they form the basis for a challenge of the temporary relief granted by the court. *Doremus* v. *Board of Education*, 342 U.S. 429, 432-33 (1952). The Order's provisions for a journeyman selection procedure, which require periodic administration of practical examinations by a Board of Examiners, are reasonable and well within the district court's discretion. *Chance* v. *Board of Examiners*, 458 F.2d 1167, 1178 (2d Cir. 1972). The criteria established by the district court for selecting A Branch members appear to be both reasonable and objective. In view of the Union's history of discrimination the establishment of a Board of Examiners was appropriate.

The Order of the district court is remanded for reassessment and recalculation of the percentage goal for non-white membership in the Union. Subject to such modification of the Order as may be made consistently with this opinion, the Order and Judgment are affirmed.

HAYS, *Circuit Judge*, dissenting:

I dissent.

I would vacate paragraphs 8 and 9(b)(ii) of the district court's order. Paragraph 8 requires the Steamfitters Union to have at least 30 percent Spanish-speaking and Negro membership by 1977, and paragraphs 9(b)(ii) requires that at least 30 percent of the persons entering Steamfitters apprenticeship classes each year be Black or Spanish-speaking. Both paragraphs violate sections 703(j) and 703(c) (1) of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(j), 2000e-2(c)(1)(1970).

The majority acknowledges that "[a]t first blush a court-ordered racial goal might appear to violate the language of § 703(j) of the Civil Rights Act," [1] but it concludes that section 703(j) does not prohibit quotas designed "to eradicate the effects of past discriminatory practices." This conclusion is supported by neither the text nor the legislative history of section 703(j).

The majority's failure to point to any textual justification for its position can be traced to the fact that section 703(j) speaks in sweeping terms, forbidding all preferential treatment. In relevant part, it provides as follows:

> "Nothing contained in [Title VII] shall be interpreted to require any . . . labor organization . . . subject to this [Title] to grant preferential treatment to any individual . . . because of the race, color, religion, sex, or national origin of such individual . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin . . . in comparison with the total number of [sic] percentage of persons of such race, color, religion, sex, or national origin in any community . . . ." 42 U.S.C. § 2000e-2(j) (1970).

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1 Since the majority generally refers to the district court's quota as a "goal," their opinion may be understood as holding that "quotas" are permissible under section 703(j), if they are called "goals."

Section 703(j) thus prohibits preferential treatment of any individual on account of racial imbalance in a union's membership. It is not concerned with the causes of imbalance, past, present, or future. It provides for no exception from its broad prohibition for imbalances caused by past discrimination. It simply removes racial preferences from the otherwise broad category of equitable relief available to a district court in a Title VII case.

The legislative history of Title VII lends no support to the distinction advanced by the majority. Rather, it emphasizes that Congress intended section 703(j) to mean exactly what it says: that under no circumstance does Title VII require or authorize the imposition of racial employment quotas as a remedial device.

The bill that became the Civil Rights Act of 1964 originated in the House of Representatives as H.R. 7152. As it was reported to the House by the House Judiciary Committee, H.R. 7152 did not contain section 703(j). See H.R. Rep. No. 914, 88th Cong., 1st Sess. 10 (1963). Nevertheless, various members of Congress in the majority of the Judiciary Committee that supported the Civil Rights Act stated in a separate report[2] that they viewed Title VII as a means of opening doors to employment for all qualified people, rather than as a means of setting employment quotas:

> "It must also be stressed that the [Civil Rights] Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty . . . . Its primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies or membership in unions are strictly filled on the basis

2 The majority report of the Committee contains only the text of H.R. 7152. All interpretive statements appear as separate reports.

> of qualification." H.R. Rep. No. 914 Pt. 2, 88th Cong., 1st Sess., Additional Views of Congressmen McCulloch, Lindsay, Cahill, Shriver, MacGregor, Mathias, and Bromwell at 29 (1963).

After H.R. 7152 passed the House, 110 Cong. Rec. 2805 (1964), it went directly to the floor of the Senate, bypassing the usual committee procedure. U.S.E.E.O.C., Legislative History of Titles VII and XI of Civil Rights Act of 1964 at 10. The proceedings in the Senate were the object of intense national interest. The opponents of the civil rights bill launched a filibuster that lasted 83 days. See generally id.; 110 Cong. Rec. 4742-14511 *passim*. One of the prime targets of the opponents was Title VII, which they claimed would impose on unions and employers a federally-administered racial quota system. The tenor of their argument is captured in the remarks of Senator Smathers:

> "[Under Title VII] every employer will have to have someone on his staff whose job will be to determine what percentage each minority group constitutes in the total population; and he will have to employ so many of each minority." Remarks of Senator Smathers, 110 Cong. Rec. 8175 (1964).

See also Remarks of Senator Smathers, 110 Cong. Rec. 7791, 8500 (1964); Remarks of Senator Tower, 110 Cong. Rec. 7778-80, 8180 (1964).

The floor leaders in the campaign to enact H.R. 7152 acknowledged the undesirability of racial hiring quotas, but even before section 703(j) was added to the bill they adamantly maintained that Title VII made illegal any consideration of race in employment or union membership, including racial quotas favoring minorities. For example, Senator Williams remarked that

"to hire a Negro solely because he is a Negro is racial discrimination, just as much as a 'white only' employment policy. Both forms of discrimination are prohibited by title VII of this bill. The language of that title simply states that race is not a qualification for employment. Every man must be judged according to his ability . . . . Those who say that equality means favoritism do violence to commonsense." 110 Cong. Rec. 8921 (1964).

Senator Williams went on to draw an analogy between Title VII and jury discrimination cases:

"The Supreme Court has ruled, in numerous cases, that racial discrimination in the selection of juries is unconstitutional . . . . But this does not mean that every jury must contain a Negro. The Court's decision does not establish quotas for juries. . . . In fact, the Supreme Court has flatly rejected the notion that there must be racial quotas for juries. [Citing *Akins* v. *Texas*, 325 U.S. 398 (1945)].

"What is true in the case of juries is also true in the area of employment. H.R. 7152 does not require that every employer with more than 25 employees hire a Negro or a certain percentage of Negroes." Id.

Senator Williams was not alone in this view. Other leaders among the proponents of H.R. 7152 repeatedly stated that Title VII, even before section 703(j) was added by amendment, prohibits quotas favoring minorities. The floor managers of H.R. 7152 reported to the Senate that

"[t]here is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race." Interpretive Memorandum of Title VII of H.R. 7152 Submitted Jointly by Senators Clark and Case, Floor Managers, 110 Cong. Rec. 7212, 7213 (1964).

See also Note, *Employment Testing: The Aftermath of* Griggs v. Duke Power Company, 72 Colum. L. Rev. 900, 924 (1972).

To neutralize the argument that Title VII would lead to racial quotas, Senator Allott introduced Amendment Number 568, which contained the substance of the present section 703(j). Senator Allott stated that the purpose of Amendment 568 was to make it clear that Title VII makes ability the sole criterion for hiring, that it does not permit racial quotas:

". . . I do not believe title VII would result in imposition of a quota system. Further, I believe that a quota system of hiring would be a terrible mistake, not only from the viewpoint of the employer, but from the viewpoint of the employee—from the viewpoint of the minority as well as the majority. Basically, I believe that the color of a man's skin, or the faith to which he adheres, should be completely extraneous considerations when an employer hires or a labor union admits to membership . . . .

"But the argument has been made, and I know that employers are also concerned with the argument. I have, therefore, prepared an amendment [No. 568] which I believe makes it clear that no quota system will be imposed if title VII becomes law." 110 Cong. Rec. 9881 (1964).

While H.R. 7152 was being debated, a series of amendments, the so-called Dirksen-Mansfield substitute, was drafted by a group of the supporters of H.R. 7152 in consultation with the Justice Department. U.S.E.E.O.C., supra at 10-11; 110 Cong. Rec. 12706-07 (1964). Among these amendments was the present text of section 703(j). When the Dirksen-Mansfield substitute was put before the Senate, one of its drafters, Senator Humphrey, explained the purpose of section 703(j) as follows:

> "A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly." Remarks of Senator Humphrey, 110 Cong. Rec. 12723 (1964).

The Dirksen-Mansfield substitute was adopted by the Senate on June 17, 1964, and by the House on July 2, 1964. See U.S.E.E.O.C., supra at 11.

The legislative history of section 703(j) makes it abundantly clear that Congress intended Title VII to require unions and employers to accept members and to hire employees without regard to race. Quotas, for whatever reason imposed, fly in the face of that intent. Nowhere in the comprehensive reports of the House Judiciary Committee, and nowhere in the 534 hours of Senate debate is there as much as an oblique suggestion that Congress intended to permit court-ordered racial quotas "to eradicate the effects of past discriminatory practices." On the contrary, the prohibition against racial preference in section 703(j) is

comprehensive. The majority's ruling today completely fails to give effect to that prohibition.

The majority finds that the district court's quotas are justified by Title VII's mandate that a court must order "affirmative action," including such equitable relief as the court deems appropriate, where necessary to redress unlawful employment practices. Civil Rights Act of 1964 § 706(g), 42 U.S.C. § 2000e-5(g)(1970). But the majority does violence to common sense and disregards the ordinary meaning of the language used when it interprets the general delegation of power found in section 706(g) as controlling the specific limitation on power found in section 703(j). On the contrary it is clear that section 703(j) limits the remedies under section 706(g). Although a district court can, and in fact must, order such affirmative action as is necessary to eliminate unlawfully discriminatory employment practices, it may not order that such practices be instituted.

"Affirmative" remedies to correct abusive practices are by no means lacking when section 706(g) is given its intended effect. For example, a district court may enjoin employer and union interference by lock-out or strike with minority efforts to enter previously segregated occupations. See, e.g., *United States* v. *United Brotherhood of Carpenters Local 169,* 457 F.2d 210, 220 (7th Cir.), cert. denied, 409 U.S. 851 (1972). It may order the establishment of a separate apprenticeship program aimed at fostering minority employment. See, e.g., id. at 216, 220; *United States* v. *Ironworkers Local 86,* 443 F.2d 544, 548, 553 (9th Cir.), cert. denied, 404 U.S. 984 (1971). It may order the admission or hiring of such specific individuals as it finds qualified. See, e.g., *Local 53, International Ass'n of Heat & Frost Insulators* v. *Vogler,* 407 F.2d 1047, 1053 (5th Cir. 1969). It may order the development of trade-

related membership and hiring criteria, and enforce its order by prohibiting admission of new members or new hires until such criteria are put into effect. See, e.g., id. at 1053. It may order a union or employer actively to disseminate in minority communities information describing training, membership and job opportunities. See, e.g., *United States* v. *Ironworkers Local 86,* supra, at 548. It may require unions and employers to keep and submit extensive records, so that the court, while retaining jurisdiction, may accurately evaluate the progress toward compliance. Id. It may forbid the use of non-job-related employment tests having racially disparate impact, and require the application of objective employment standards. See, e.g., *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 436 (1971); *Vulcan Society* v. *Civil Service Comm'n,* 490 F.2d 387 (2d Cir. 1973). And as was done in the present case, it may appoint an administrator to effectuate the various remedial alternatives in an affirmative action program. These are examples of the remedies that Congress had in mind when it used the term "affirmative action." It is not necessary to resort to the one means that Congress has specifically denied the courts, preferential hiring.

The majority seeks to justify their ordering of racial quotas on the authority of three cases recently decided by this court, cases the principles of which it claims are directly applicable here: *United States* v. *Wood, Wire & Metal Lathers, Local 46,* 471 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939 (1973); *Vulcan Society* v. *Civil Service Comm'n,* supra; and *Bridgeport Guardians, Inc.* v. *Civil Service Comm'n,* 482 F.2d 1333 (2d Cir. 1973). None of these cases justifies approving the quotas in the present case. *Wood, Wire & Metal Lathers* arose out of an agreement under which a union settled an action brought by the United States under Title VII. We specifically found

that the union had waived the benefit of section 703(j) in the settlement agreement, so that it could not object to the new membership ratio imposed by the court. 471 F.2d at 412-13. In the present case there is no such waiver.

Vulcan Society and *Bridgeport Guardians* stand for no more than the proposition that interim quotas are permissible in actions brought by persons seeking public employment under section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970). Neither case was a Title VII action, so in neither case was the district court inhibited by section 703(j). In *Vulcan Society* and *Bridgeport Guardians* we approved of only interim hiring quotas pending state development of job-related employment examinations. The fact that public servants were involved was the critical justification for the interim quotas:

> "[P]erhaps the most crucial consideration in our view is that this is not a private employer and not simply an exercise in providing minorities with equal opportunity employment. This is a police department and the visibility of the Black patrolman in the community is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement." 482 F.2d at 1341.

In the present case racial quotas are not being used to promote a public interest but to allocate private economic benefit.

Moreover in *Vulcan Society* and *Bridgeport Guardians* there was no other means of affording relief that did not interfere with essential public services. See 490 F.2d at 398. In *Vulcan Society,* the district court was faced with a choice between enjoining the appointment of new firemen until job-related selection criteria were developed by New York City, or allowing interim recruitment according to

a fixed white-minority ratio. We approved the choice of the latter alternative as the lesser of two evils since the former would have seriously jeopardized the safety of city residents.

The majority states that "[e]ight circuits, including our own, have construed [Title VII's] delegation of broad equitable power as authorizing the district court to establish goals or quotas for the purpose of remedying the effects of past discriminatory conduct." The cases cited by the majority in support of this proposition are neither unqualified nor consistent in their treatment of section 703(j). The variety of approaches manifested in these cases illustrates the overwhelming need to keep the text and legislative history of Section 703(j) firmly in mind when dealing with a case to which it may apply. In any event, a substantial number of the cases cited by the majority do not apply to the present facts. *Pennsylvania* v. *O'Neill*, 348 F. Supp. 1084 (E.D. Pa. 1972), aff'd in part & vacated in part, 473 F.2d 1029 (3d Cir. 1973) (en banc), and *Morrow* v. *Crisler*, —— F.2d —— (5th Cir. March 27, 1974), slip op. at 2068, are civil rights actions in the area of public employment. See, e.g., 348 F. Supp. at 1103, 1104. Like *Vulcan Society* and *Bridgeport Guardians* they hold only that interim quotas may be employed in a section 1983 action while a local or state government develops job-related tests for police force applicants. *Associated General Contractors* v. *Altshuler*, 361 F. Supp. 1293 (D. Mass.), aff'd, 490 F.2d 9 (1st Cir. 1973), cert. denied, 42 U.S.L.W. 3593 (April 23, 1974), *Contractors Association of Eastern Pa.* v. *Secretary of Labor*, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971), and *Southern Illinois Builders Ass'n* v. *Ogilvie*, 471 F.2d 680 (7th Cir. 1972), each involve racial quotas under Part III of Executive Order 11246, 42 U.S.C.A. § 2000e at 281, 284 (1974). *United States* v. *United Brotherhood of Carpenters, Local 169*,

supra, was an action against unions for improper practices under Title VII in which the court stated that the district court had broad remedial power to effect the purpose of Title VII but in which it stopped short of ordering the unions to accept members according to a fixed racial quota.

Of the decisions cited by the majority, only *United States* v. *Ironworkers Local 86*, supra, *Local 53 International Ass'n of Heat & Frost Insulators* v. *Vogler*, supra; *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *United States* v. *Local 212, IBEW*, 472 F.2d 634 (6th Cir. 1973), and *United States* v. *IBEW, Local* 38, 428 F.2d 144 (6th Cir.), cert. denied, 400 U.S. 943 (1970), support the proposition that quotas may be employed in Title VII cases. None of these opinions contains a reasoned discussion of its rationale for not giving effect to section 703(j). These cases disregard section 703(j) and should not be followed by this court.

Title VII was enacted by a Congress that wanted to end racism. The racism directed by the district court's employment quotas is completely out of tune with the purpose of Title VII.

We have approached racial quotas only "somewhat gingerly" in the past and approved them only in exceptional cases, cases involving, for example, public employment. See *Bridgeport Guardians*, supra, at 1340. Judicial resort to racial classification is designed to make racism respectable. It gives legal sanction to the unfortunate attitudes which have resulted in the exclusion of minorities from the mainstream of the nation's economy.

For these reasons, I would modify the district court's order by vacating paragraphs 8 and 9(b)(ii).

Opinion of Frankel, *U.S.D.J.*,
Dated March 24, 1971

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

March 24, 1971.

No. 71 Civ. 847

GEORGE RIOS, EUGENE C. JENKINS, ERIC O. LEWIS and WYLIE B. RUTLEDGE,

Plaintiffs,

—v.—

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL UNION NO. 638 OF U. A., MECHANICAL CONTRACTORS ASSOCIATION OF NEW YORK, INC. and the JOINT STEAMFITTING APPRENTICESHIP COMMITTEE OF THE STEAMFITTERS' INDUSTRY EDUCATIONAL FUND,

Defendants.

FRANKEL, *District Judge.*

The four plaintiffs, three black and one Puerto Rican, charge that they have suffered denials of employment and lost other advantages of union membership because of unlawful discriminations on account of race and national origin. They bring this suit for themselves and for the class of persons they describe as being similarly situated. Their com-

plaints appear to be primarily against defendant Union, Enterprise Association Steamfitters Local Union #638 of U. A., but they charge wrongs also by defendant Mechanical Contractors Association of New York, Inc., an employer group, and by defendant Joint Steamfitting Apprenticeship Committee of the Steamfitters' Industry Educational Fund, an employer-union entity. As substantive bases for their claims, plaintiffs invoke the relatively ancient and general civil rights provisions of 42 U.S.C. §§ 1981 and 1983, along with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The Court's jurisdiction is rested upon 28 U.S.C. §§ 1343, 2201 and 2202.

Simultaneously with the filing of their complaint, plaintiffs brought by order to show cause a motion for a preliminary injunction. In addition to affidavits and exhibits from both sides, the court has heard the live testimony of five witnesses called by plaintiffs, one of whom was also deposed between the noticing and the return date of the motion. Defendants offered no such additional evidence. Upon the record thus made, and solely for the question of temporary relief now decided, the court states the following findings and conclusions:

Defendant Local Union serves as a collective bargaining representative for steamfitters employed in the construction industry in the New York City metropolitan area. By its agreement with defendant Contractors Association, the Union engages to "furnish to the members of the * * * Association all the competent steamfitters and apprentices which they demand * * *." To implement this arrangement, the Union keeps its "books of membership" open for transfers of workers from other locals, and supplies the employer group with current membership lists. In addition to these

explicit arrangements, business agents of the Union serve the members who need jobs, at least by supplying information as to openings. Moreover, the Union purports to screen people for competence in accepting them for membership, so that the status of member serves in some measure as a certification of suitability to prospective employers. Finally, while it is not critical for present purposes and therefore not necessary to pursue in detail, there is evidence of union pressure upon both contractors and workers to discourage the employment of non-union men for jobs as steamfitters.

It seems plain, in sum, that membership in defendant Union is a substantial help, and non-membership a substantial detriment, in obtaining and keeping employment in the steamfitting industry. And this is the central concern of three of the four plaintiffs now before the court who contend that they are qualified and experienced as steamfitters, but denied the benefits of union membership because of their race or national origin. George Rios is of Puerto Rican ancestry; Eugene C. Jenkins and Eric O. Lewis are Negroes. They range in age from 30 to 37. All three have had substantial training as steamfitters and plumbers, mainly on the job, and, in Jenkins's case, in school and in military service as well. All three have worked for substantial periods as steamfitters, proving themselves competent at their work.

While these three plaintiffs have worked in the steamfitting industry, and were reported to be so employed at the time of our evidentiary hearing, they have suffered, and they face, periods of unemployment which would in all probability have been (or will be) shortened by the advantages of information and other assistance flowing from membership in defendant Union. They have sought such

membership in vain. The Union, as is reflected dramatically in its overwhelmingly white and non-Spanish membership[1] contrasted with the composition of the working population in its area, has followed a course of racial discrimination over the years. Cf. Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 426 (8th Cir. 1970), and cases cited therein; Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970); United States v. Hayes International Corporation, 415 F.2d 1035, 1043 (5th Cir. 1969). The same animus, now plainly unlawful if it was ever otherwise, has prompted the denial of membership to plaintiffs Lewis, Rios and Jenkins. The Union has repeatedly failed to respond to the requests for application forms or for admission made by these three plaintiffs. Plaintiff Lewis, when he went to the office of defendant Mechanical Contractors Association of New York, Inc., was told that he did not meet union qualifications.[2] But before this court, the defendants have made no attempt to rebut the strong evidence from plaintiffs and their past and present employers that they are fully qualified to perform a steamfitter's job.[3] Fur-

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[1] Of approximately 4,000 persons in the building trades branch of the Union, 28 are black and 13 have Spanish surnames.

[2] According to his affidavit, in uncontradicted portions which the court credits, Lewis was told that "to join the Union I would have to complete the apprenticeship program. I was also told that I probably wouldn't want to take the apprenticeship program since the pay was low." In contrast with that pattern of deterrence Union President Tom Murray stated in his deposition that only one-third of the Union's members have gone through the apprenticeship program.

[3] Defendants argue that, at best, plaintiffs are experienced as plumbers not steamfitters. The evidence shows, however, that plaintiffs have substantial experience doing both plumbing and steamfitting work. Moreover, on the present record it appears that the

ther evidence of the Union's discriminatory behavior appeared in the uncontradicted testimony of Frederick Clarke, a contractor for whom plaintiffs Rios, Jenkins and Lewis were employed as steamfitters in 1970. Clarke testified that a business agent from defendant Union visited his Harlem work site in April 1970, questioned Rios about not having a Union book, and told Clarke that he had to hire Union men. Clarke asked the Union agent to issue permits for the non-union men then working at the site, but there was never any action on this request, although Clarke himself eventually signed a collective bargaining agreement with the Union.

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two jobs are similar and that a plumber is qualified to do most if not all the work of a steamfitter. Defendants have offered no evidence which refutes the conclusion on this point of plaintiffs' experienced witness.

Section 158 of the Union Constitution requires an applicant for membership to show that he has had "at least five (5) years actual practical working experience in the *plumbing* [emphasis added] and pipefitting industry." It is questionable whether plaintiffs Lewis and Rios could meet this qualification, although plaintiff Jenkins would appear to. However, while the argument is made (and rejected by this court) that plaintiffs are not experienced enough as steamfitters, there has been no suggestion on the Union side that this five-year provision of the Union Constitution played any part in the exclusion of any of these plaintiffs. In addition, in an industry where racial discrimination has been practiced for years, a rigid five-year work experience requirement which perpetuates the effects of prior discrimination may well violate Title VII. Cf. Local 53 of Int. Ass'n of Heat & Frost I. & A. Wkrs. v. Vogler, 407 F.2d 1047, 1054-1055 (5th Cir. 1969); Dobbins v. Local 212, International Bro. of Elec. Wkrs., 292 F.Supp. 413, 445 (S.D. Ohio 1968); United States v. Sheet Metal Wkrs. Int. Ass'n, Local U. 36, 416 F.2d 123, 133 (8th Cir. 1969); Local 189, United Papermak. & Paperwork. v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 108 (1970); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 426-427 (8th Cir. 1970).

The record as it is now made is convincing that the Puerto Rican ancestry of Rios and the skin color of Lewis and Jenkins in fact explain their exclusion from the Union.

It is not disputed that these plaintiffs have duly and meticulously pursued the administrative remedy of attempted conciliation provided by Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e–5. They have received requisite letters from the Equal Employment Opportunity Commission authorizing the institution of the present suit. 42 U.S.C. § 2000e–5(e). And they have, as the foregoing findings show, demonstrated a large probability of ultimate success in proving the violations Congress has denounced.

The Union, on the other hand, reveals, and indeed insists upon, factors that tilt the balance of the equities still farther toward the plaintiffs. The Union denies that it operates a hiring hall. It goes on to urge, unsuccessfully but revealingly, that union membership is not at all relevant to the obtaining of employment, this being handled on his own by each man (there are said to be no woman steamfitters, and this is not here in question). Union counsel suggested in argument, however, that the worth of the Union's imprimatur will suffer if unqualified workers are "held out" as competent steamfitters by virtue of their membership. Thus, the Union essentially concedes that membership may be of substantial utility in gaining employment, if only because employers interpret membership as a sign of competence. There is, in all these circumstances, no reason for serious concern about the Union's reputation, since the indications are that Rios, Jenkins and Lewis are amply qualified. In sum, the dubious and speculative injuries to the Union from a temporary injunction are solidly outweighed by the harm the three qualified plaintiffs would suf-

fer from its denial. The preliminary relief they seek will be granted. Cf. Local 53 of Int. Ass'n of Heat & Frost I. & A. Wkrs. v. Vogler, 407 F.2d 1047 (5th Cir. 1969); United States v. Hayes International Corporation, 415 F.2d 1038 (5th Cir. 1969).

Different questions are presented, and a different result is reached, in the case of the remaining plaintiff, Wylie B. Rutledge. Rutledge is 21 years old, black, and, according to his affidavit, possessor of a high school equivalency diploma. He has for some time been enrolled in a program for recruitment and training of young minority group workers for jobs in construction industry apprenticeship programs. In November, 1969, he took and passed an examination given by the elevator constructors' union. He went to work as an apprentice for two months thereafter. Then, his affidavit says: "I was not allowed to complete the apprenticeship program of the elevator constructors because I was dismissed by two employers, allegedly because I missed and was late for work too frequently." His affidavit also describes some miscellaneous work experience unrelated to the construction industry and to the issues in this case.

In January, 1970, Rutledge received notice of a forthcoming examination for admission to defendant Apprenticeship Committee's apprenticeship program. The examination, originally devised and run for the Committee by New York University, and administered since 1967 by Stevens Institute of Technology, embraces four tests—in "verbal meaning," "number facility," "mechanical comprehension," and "spatial relations." Rutledge enrolled in a class run by the Workers Defense League to help prepare for the examination, which he then took on January 31, 1970. In his affidavit he says:

> "I took the test at the scheduled time and I believe I received passing grades on all aspects of that test. I believe that I was not admitted because the program accepts only a small number of the applicants."

Contrary to Rutledge's assertion, the record before the court shows that he failed a critical portion of the examination, and was so informed over a year ago on February 20, 1970. As the notice to him stated, the requirement was to score above the lowest 25% of those taking the examination. Rutledge met the requirement with respect to verbal meaning, number facility, and spatial relations—the three components which, in the order listed, are surfacially most suspect as subjects for testing prospective steamfitters. He fell at the 18th percentile, however, on mechanical comprehension.

The record is less than complete or completely satisfying with respect to the test and its effect. The picture may change markedly after the case is fully tried. Upon the present record, however, there is no evidence that the test operates or has operated "to disqualify Negroes at a substantially higher rate than white applicants * * *." Griggs v. Duke Power Company, 401 U.S. 424, p. 426, 91 S.Ct. 849, p. 851, 28 L.Ed.2d 158. Since plaintiff Rutledge does not provide the basis for any finding that the test is "discriminatory in operation" (*id.* at 431, 91 S.Ct. at 853), there may be no need to assess in detail whether defendants have met the burden of showing that test performance is related to job performance. *Id.* at 432, 91 S.Ct. at 854; 42 U.S.C. § 2000e-2(h); 35 Fed. Reg. 12333 (Aug. 1, 1970). Even as to that, however, the present record weighs against Rutledge. The evident relevance of mechanical comprehension to the work in question, the buttressing of this point by a witness *for*

plaintiffs, and the sponsorship of the examination all indicate that it is fairly and aptly designed for a legitimate purpose. Whether defendants must show more to meet the burden when the case has been fully tried is a matter to consider later.[4]

In short, the most basic and decisive factor against Rutledge on the present motion is the weakness of his case on the merits. He has other difficulties as well. Rutledge knew or should have known over a year ago that he had been rejected on the ground of his insufficient test score. He evidently did nothing until December 14, 1970, when he complained to the New York State Division of Human Rights. Then, on February 16, 1971, he complained to the United States Equal Employment Opportunity Commission, long after expiration of the 210-day period prescribed by 42 U.S.C. § 2000e–5(d). Having tardily invoked that remedy, he suddenly moved with an ill-timed burst of speed, joining in this suit before expiration of the 60-day period

[4] While defendants may have to demonstrate more upon a full record—for example, a more particularized relationship between the written test and "successful performance of the jobs for which it [is] used," and perhaps even a "study" demonstrating the connection, Griggs v. Duke Power Company, *supra* at 853—there are also other things potentially adverse to Rutledge. He claims, and ought to be held to the claim, that he has the equivalent of a high school education. For what it may be worth, the fairness of putting Rutledge to a written test may differ from a case like *Griggs,* arising in an environment of segregated schooling. *Id.* at 5-6. But cf. Taylor v. Board of Education of City School District of New Rochelle, 191 F.Supp. 181 (S.D.N.Y.), aff'd. 294 F.2d 36 (2d Cir.), cert. denied 368 U.S. 940, 82 S.Ct. 382, 7 L.Ed. 339 (1961). In any event, it should be noted that since Rutledge claims he has a high school equivalency diploma, he is not in a position to suffer whatever discriminatory effects might follow from the requirement that an apprenticeship applicant submit a high school diploma or equivalency certificate. Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 427-428 (8th Cir. 1970).

and the Commission notification required by 42 U.S.C. § 2000e-5(e) and applicable regulations.[5]

Thus, having come finally to seek relief under Title VII of the Civil Rights Act of 1964, plaintiff has managed, at least until now, to generate large, possibly decisive, procedural obstacles to his success in this enterprise. Rutledge argues, however, that he is not confined to Title VII, and that his claim may be sustained under older sections of Title 42, namely §§ 1981 and 1983. Whether or not it will ultimately prevail in this case, there is substance in the contention that either or both of these statutes may now be seen to outlaw racial discrimination in employment. But while the existence of Title VII, with its specific and detailed administrative remedies, does not appear to preclude the use of the alternative statutes, Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), cert. denied 401 U.S. 948, 91 S.Ct. 935, 28 L.Ed.2d 231 (March 1, 1971); cf. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237, 90 S.Ct. 400, 24 L.Ed.2d 386 (1970), it has been held that a plaintiff may have to present some reasonable justification for bypassing the administrative forum, Waters v. Wisconsin Steel Works of International Harvester Company, 427 F.2d 476, 481, 487 (7th Cir.), cert. denied sub nom. United Order of Bricklayers and Stone Masons, Local 21 v. Waters, 400 U.S. 911, 91 S.Ct. 137, 27 L.Ed.2d 151 (1970);

[5] 42 U.S.C. § 2000e-5(e) provides that a civil action may be brought thirty days after a charge is filed with the Commission, "except that • • • such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted • • •." The Commission has issued regulations permitting it to consider and attempt conciliation in all cases for the full 60 days after the filing of a charge. 29 C.F.R. § 1601.25a.

State of Washington v. Baugh Construction Co., 313 F.Supp. 598 (W.D. Wash. 1969); cf. Young v. International Telephone & Telegraph Co., 438 F.2d 757 (3rd Cir., 1971); but see Sanders v. Dobbs Houses, Inc., *supra*. And even if the complete bypassing of the EEOC may be allowable, it does not follow that a plaintiff may invoke the help of that agency and then short-circuit its efforts by premature resort to the federal court.[6]

The shape of Rutledge's case on the preliminary motion now before the court makes this a particularly unsuitable occasion for allowing suit while the procedures of the EEOC remain to be completed. As things appear thus far, Rutledge will not succeed in showing racial discrimination as a matter of fact. It will be time enough if he ultimately proves such conduct, and if the obvious and specific remedies of Title VII should then be held to be foreclosed, to consider whether the suggested alternatives are available to him as a matter of substantive law.

For the reasons stated, the motion of plaintiff Rutledge will be denied. A preliminary injunction will issue in favor of plaintiffs Rios, Jenkins and Lewis,[7] restraining defen-

[6] The cases cited above discuss the application of 42 U.S.C. § 1981 to claims of racial discrimination by unions or private employers. Plaintiffs cite no authority supporting their reliance upon 42 U.S.C. § 1983, and there is no need at this stage to explore the possible application of that statute.

[7] The four plaintiffs, despite the different situation of Rutledge, undertook to sue on behalf of a single "class." In the brief time from the filing of suit to the hearing of the instant motion, there has been no proceeding under Fed.R.Civ.P. 23(c) and our local Civil Rule 11A to determine whether the suit may be so maintained and, if so, how the alleged class is to be defined. It seems orderly and, indeed, necessary, therefore, to rule only with respect to the named plaintiffs, postponing for another time any possible impact upon others who may turn out to be similarly situated.

dant Union from denying them union membership on terms and conditions, and with rights, privileges and responsibilities, equal to those of all other members enjoying the status of full journeymen, without regard to race or national origin.[8]

Settle order on notice.

[8] Plaintiffs' prayer sought to compel the Union "to place them in the highest hiring hall referral category and * * * to refer them for steamfitting work as if they were full journeymen in the highest hiring hall referral category." There is, at least thus far, no showing that the Union operates what may literally be called a "hiring hall." However, there is evidence, sketched above, of specific and measurable union influence upon the getting and keeping of jobs. It may well be—and the Union should know best—that this impact is broader and more concretely detailed than has thus far appeared. Considering the nature of the subject matter, the distribution of the pertinent knowledge, and the relatively precise focus upon employment and employment opportunities, it seems fitting that the injunction should be formulated in terms that require the Union simply to give plaintiffs no less of the things in question than it gives to other members. Within these directions there should be enough from which the parties can propose a decree fully comprehensible to those who must obey it. Cf. International Longshoremen Ass'n, Local 1291 v. Philadelphia Marine Trade Assn., 389 U.S. 64, 76, 88 S.Ct. 201, 19 L.Ed.2d 236 (1967); Developments in the Law—Injunctions, 78 Harv.L.Rev. 994, 1066 (1965). Of course, the court does not sit in equity to trap the innocent unwary. If there are genuine problems of construction, they may be tendered in all good conscience for such declaratory guidance as may be necessary in the absence of an agreed course charted in good-faith consultations between the parties. See Regal Knitwear Co. v. National Labor Relations Board, 324 U.S. 9, 15, 65 S.Ct. 478, 89 L.Ed. 661 (1945).

Order of Frankel, *U.S.D.J.*,
Dated April 16, 1971

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

April 16, 1971.

71 Civ. 847.

GEORGE RIOS, *et al.*,

Plaintiffs,

—v.—

ENTERPRISE ASSOCIATION STEAMFITTERS, LOCAL 638 *et al.*,

Defendants.

FRANKEL, *D. J.*:

Plaintiffs having moved by order to show cause, dated February 26, 1971, for an order providing for a preliminary injunction (1) restraining the Enterprise Association, Steamfitters Local Union #638 of U.A. from discriminating against plaintiffs, Rios, Jenkins and Lewis, and members of their class by refusing to place them in the highest hiring hall referral category and by refusing to refer them for steamfitting work as if they were full journeymen in the highest hiring hall referral category, and (2) restraining the Union, Mechanical Contractors Association of New

York, Inc., and the Joint Steamfitting Apprenticeship Committee of the Steamfitters' Industry Educational Fund from discriminating against plaintiff Rutledge and members of his class by refusing to admit them to the steamfitters' apprenticeship program operated by the defendants; and the court having taken oral testimony at a hearing held herein on March 15, 1971, and having read and filed the affidavits and exhibits submitted in support of said motion and in opposition thereto; and after due deliberation, and after rendering and filing the opinion of this court, on March 24, 1971; it is hereby

Ordered that, without payment of any initiation fee at this time, but reserving for final decision in this action the question whether such payment shall be required as a condition of continued membership, and the amount thereof, if any, plaintiffs Rios, Jenkins and Lewis be admitted to full journeymen membership status in the Building and Construction Trades Branch of the Union with rights, privileges and responsibilities equal to those of all other members enjoying full journeyman status, these rights and privileges to include the services provided by the Union in assisting members in obtaining employment with steamfitting industry employers in the geographic area of the Union's jurisdiction; and it is further

Ordered that the motion of plaintiff Rutledge be, and it hereby is, denied.

Order of Tenney, *U.S.D.J.*,
Dated August 10, 1971

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 71 Civ. 847

August 10, 1971

GEORGE RIOS *et al.*,

Plaintiffs,

—v.—

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL UNION #638 OF U.A. *et al.*,

Defendants.

TENNEY, District Judge.

Plaintiffs move herein for an order pursuant to Rule 23(c) of the Federal Rules of Civil Procedure and Rule 11A of the Civil Rules of this court:

1) allowing this action to be maintained as a class action pursuant to Rules 23(a) and 23(b) (2) of the Federal Rules of Civil Procedure; and

2) defining the class represented by plaintiffs to include all Negro and Spanish sur-named Americans residing in

New York City and the Counties of Suffolk and Nassau in the State of New York now or at any time in the future who have the skills necessary to work as journeymen steamfitters or who are capable of learning such skills and who wish to obtain access to steamfitting work in New York City and said Counties.

Plaintiffs have brought this action on behalf of themselves and all other Negro and Spanish sur-named Americans who wish to obtain steamfitting work and who now have or are capable of learning the skills necessary to perform such work in the geographical area over which the defendant Enterprise Association Steamfitters Local Union #638 of U.A. (hereinafter referred to as the "Union") has jurisdiction.

Plaintiff Rios, a Puerto Rican citizen of the United States, and plaintiffs Jenkins and Lewis, Negro citizens of the United States, are all individuals who have learned the skills of steamfitting and have had substantial training as steamfitters and plumbers through employment as such and, in the case of Jenkins, in school and military service as well—all of them having learned their skills without taking the apprentice program operated by defendants and challenged herein as one of defendants' discriminatory employment barriers.

Plaintiff Rutledge, a Negro citizen, while not possessed of the skills of the other named plaintiffs, is allegedly intelligent and able-bodied and fully capable of learning steamfitting work.

Plaintiffs have alleged that the defendants have imposed racially discriminatory barriers to minority group employment in the steamfitting industry in that the Union will not admit them to membership unless they complete the appren-

ticeship program operated by defendant Union, although plaintiffs are fully qualified to do steamfitting work, and that the apprenticeship program is a discriminatory device because it imposes a number of barriers to obtaining work as a steamfitter, which barriers are not related to that work and which require workers to be overqualified to do such work.

A class action must meet the requisites of Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure. Federal Rule of Civil Procedure 23(a) provides:

> "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

Rule 23(b) provides in part:

> "An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition . . . (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

There seems little question that at least plaintiffs Rios, Jenkins and Lewis and the other members of the class which they represent have been adversely affected by a policy of racial discrimination in the steamfitting industry. Indeed,

in an opinion herein, filed on March 24, 1971, Judge Frankel granted a preliminary injunction in favor of such plaintiffs, restraining the defendant Union from denying them Union membership on terms and conditions, and with rights, privileges and responsibilities, equal to those of all other members enjoying the status of full journeymen, without regard to race or national origin.

It would appear that there are numerous minority workers in the Union's geographical area who are already skilled in the steamfitting trade and who are not members of the Union, and it would also appear that there are numerous minority workers who wish to acquire steamfitting skills and who are capable of acquiring such skills. It further appears that there are questions of law and fact common to the class and that the claims of the named plaintiffs are typical of those of the class. Furthermore, the claims of plaintiffs Rios, Jenkins and Lewis are typical of the claims of the class since each of them is a skilled steamfitter, and each of them acquired his skills by means other than the apprentice program which is alleged in this motion as one of the discriminatory barriers to steamfitting employment. Plaintiff Rutledge occupies a somewhat different position and has alleged that he was denied admission to the challenged apprenticeship program—that program and its entry requirements being used to prevent him from becoming a member of the Union and thus to discriminate against him. It further appears that the named plaintiffs will fairly and adequately protect the interests of the class. Indeed, their attorneys have already successfully sought and obtained preliminary relief on behalf of three of the named plaintiffs in this action.

Insofar as the provision of Rule 23(b) (2) of the Federal Rules of Civil Procedure is concerned, the requirements of

that Rule, namely, that the party opposing the class has acted or refused to act on grounds generally applicable to the class, indicate the desirability of providing for two separate and distinct classes. The distinction between an alleged class of all Negro and Spanish sur-named qualified journeymen steamfitters who seek admission to the defendant Union on the one hand, and a class of such minority group members who have no such steamfitting skills but who are capable of learning such skills and wish to obtain access to steamfitting work is clear, and the issues involving the claims of the two distinct classes should not be confused by being combined into a single class as plaintiffs seek.

Accordingly, the motion is granted alllowing this action to be maintained as a class action and the class is defined separately as (a) "all Negro and Spanish Sur-named Americans residing in New York City and the Counties of Suffolk and Nassau in the State of New York now or at any time in the future who have the skills necessary to work as journeymen steamfitters" and (b) "all Negro and Spanish Surnamed Americans residing in New York City and the Counties of Suffolk and Nassau in the State of New York now or at any time in the future who are capable of learning such skills and who wish to obtain access to steamfitting work in New York City and said Counties."

The defendants other than the Union do not appear to oppose the maintenance of this action as a class action provided that the order provides for two separate and distinct classes as hereinbefore set forth and providing further that the Government and other antidiscriminatory agencies whose constituencies are embraced in their entirety within the proposed classes receive such notice as the Court deems proper of the proposed class action, and are given an opportunity to object if they wish to. Whether representatives of

such agencies would be appropriate parties to the present action as amicus curiae or otherwise is not presently before this Court, and the Court declines to condition the relief sought herein upon notice being given to such agencies.

Accordingly, plaintiffs' motion is granted to the extent hereinbefore indicated.

Findings of Fact and Conclusions of Law of Bonsal, *U.S.D.J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[Filed January 3, 1972]

71 Civ. 2877

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

LOCAL 638, *et al.*,

Defendants.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION No. 28,

Third-Party Plaintiff,

—v.—

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

SHEET METAL WORKERS (LOCAL UNION No. 28) JOINT APPRENTICESHIP COMMITTEE AND TRUST,

Fourth-Party Plaintiff,

—v.—

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

BONSAL, *D.J.*

FINDINGS OF FACT

I. *Background*

1. Local 638 is a labor union whose territorial jurisdiction consists of the 5 boroughs of the City of New York and Nassau and Suffolk counties (Tr. 16).

2. Local 638 is a member of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (Tr. 23).

3. Local 638 has two branches—a construction or A branch whose members do mainly construction work and a metal trades or B branch whose members work in shops and do repair work (Tr. 15-16; Gov't Ex. 1-pp4-5).

4. At the present time, there are approximately 3850 journeymen members of the A branch, of whom 31 are non-white (Tr. 16), and 2800-3000 members of the B branch, of whom approximately 500 are non-white (Tr. 16; Gov't Ex. 1-pp5, 8).

5. There were no non-white journeymen members of the A branch until 1967 (Gov't Ex. 15-3A(3) and (4)).

6. In the past, Local 638 has discriminated against minority workmen in admitting members to the A branch.

7. Members of the A branch have a higher hourly rate of pay than members of the B branch (Tr. 20).

8. Local 638 has 15 officers and eleven business agents, all of whom are white (Tr. 17; Gov't Ex. 1-p8).

9. The Mechanical Contractors Association of New York, Inc. ("MCA") is a trade association of heating, ventilating

and air conditioning contractors in the New York area (Tr. 58).

10. MCA has approximately 60 members who employ members of Local 638. (Tr. 59).

II. *Membership Requirements*

11. The only operative requirements for membership in the A branch are that each applicant must have at least 5 years of practical working experience in the plumbing and pipe fitting industry and must be of good moral character. (Gov't. Ex. 2-sec. 158, 162).

12. Procedurally, applicants to the A branch send letters to the union stating their qualifications, which letters are reviewed by a committee composed of three of the Union's officers (Gov't Ex. 1-p. 13). These applications are kept on file (Tr. 22) and when additional members are needed in the union—a determination which is based upon the demand for labor (Tr. 21)—applicants are called down, interviewed and, if they have the necessary qualifications, accepted (Tr. 20-1).

13. The union's application process is designed to keep the union membership from being flooded (Tr. 487), by admission of only a small number of new members; this ensures the existence of a shortage of A men, and tends to give them job security and high wages.

III. *Advantages of A Branch Membership*

14. Being a member of the A branch is a substantial aid in obtaining a job as a construction steamfitter in the territorial jurisdiction of Local 638 (Tr. 141; 235; 283).

15. Being a member of the A branch is a prerequisite to obtaining job security and preventing early lay-offs. (Tr. 101, 109, 235, 251, 270, 283, 302).

16. Another advantage of A branch membership is the greater opportunity for advancement (Tr. 128-30).

17. A fourth advantage of A branch membership is the greater opportunity to earn overtime pay (Tr. 270; 501-2).

IV. *Shortage of Men in A Branch*

18. In the post-war era, there has been a shortage of construction steamfitters in the New York area (Tr. 152, 171-2, 182, 197-9, 357, 464, 528) as well as a shortage of welders (Tr. 152, 172).

19. As a result of said shortage of manpower, the employers have been required to expend substantial monies for overtime (Tr. 153, 172, 468).

20. In addition, the union has referred B men to work as construction steamfitters in its jurisdiction (Gov't Ex. 1-pp. 27-8, 35).

21. At present there are at least 75 minority members of the B branch and approximately 100 minority non-union men who are working as construction steamfitters in the jurisdiction of local 638 (Tr. 75-8; Gov't Ex. 7, 8).

22. The minority workmen presently employed as construction steamfitters receive A scale wages. (Gov't Ex. 1-p.11).

V. *Minority Workmen and Their Qualifications*

23. The Joint Apprenticeship Program of the Workers Defense League ("WDL") is a non-profit organization funded by the U.S. Department of Labor whose purpose is to recruit and place minority construction workers (Tr. 212).

24. Last summer the WDL, which is the recognized authority for profession recruitment of minorities in the construction business (Tr. 70-1) recruited one hundred minority workmen who were placed in jobs as construction steamfitters by members of the MCA (Tr. 70).

25. Representatives of the employers reviewed the background of these men (Tr. 71-2), all of whom had at least five years experience in the pipefitting industry (Tr. 83-4).

26. These minority workmen were tested by the recognized testing authorities to determine who could weld (Tr. 72-3) and, although these men were not given the normal cram course (Tr. 75), 25 men were certified and another 25 scored high on the test (Tr. 73).

27. The fifty workmen who scored well on the test were given welding jobs and the other men were employed as steamfitters by members of MCA (Tr. 73-4).

28. The minority workmen (B branch members and non-union) who are presently employed as construction steamfitters are doing the same kind of work as members of the A branch on their respective job sites (Tr. 100, 125, 139, 154, 235, 269, 281, 301).

29. Many of said minority workmen have far more than 5 years experience in the pipefitting industry (Tr. 83, 99, 107, 121, 137, 231, 248, 298, 499).

30. The employers find these 169 minority workmen on the whole to be as competent as A men (Tr. 154, 156, 172, 194, 207) and wish to keep them on (Tr. 13).

VI. *Union Membership for Minorities*

31. The 169 minority workmen desire to join the A branch of Local 638 (Tr. 101, 109, 128, 141, 234, 251, 283, 302).

32. A number of the minority workmen have applied for membership in the A branch (Tr. 102, 130-1, 141-2, 270-1, 302-3; Gov't. Ex. 10, 12, 13) but none have become members (Tr. 101, 128-132, 140-1, 270-1, 302).

33. Others have not applied for A branch membership because they believed such an application would be useless (Tr. 109, 235).

34. All of the minority workmen meet the requirements to become members of the A branch.

35. The union's denial of membership in the A branch to these 169 minority workmen constitutes a discrimination based upon race and national origin.

CONCLUSIONS OF LAW

1. Local 638 is a labor organization within the meaning of 42 U.S.C. § 2000e(d) and is engaged in an industry affecting commerce within the meaning of 42 U.S.C. § 2000e(d).

2. The Court has jurisdiction over this action by virtue of 42 U.S.C. §2000e *et seq.* The Attorney General is authorized under the Civil Rights Act of 1964 to institute suit to enjoin a pattern or practice of discrimination and request such relief as may be necessary to insure the full enjoyment of rights described in Title VII. 42 U.S.C. §2000e-6(a).

3. The government has established a *prima facie* case that defendant Local 638 has pursued a pattern and practice of conduct with respect to employment opportunities in the construction industry which has denied minorities the same opportunities available to whites. *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970); *United States* v. *Dillon Supply Company*, 429 F.2d 800 (4th Cir. 1970); *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *United States* v. *Sheet Metal Workers, Local 36*, 416 F.2d 123 (8th Cir. 1969); *United States* v. *Hayes International Corporation*, 415 F.2d 1038 (5th Cir. 1969); *Rios* v. *Enterprise Ass'n Steamfitters Local U #638 of U.A., et al.*, 326 F.Supp. 198 (S.D.N.Y. 1971).

4. The defendant Local 638's membership policies, which the Government has established as having the effect of perpetuating past discrimination, are unlawful. See *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971); *Jones* v. *Lee Way Motor Freight, Inc., supra; United States* v. *IBEW, Local 38*, 428 F.2d 144 (6th Cir. 1970) *cert. denied*, 400 U.S. 943 (1970); *Local 189, United Papermakers and Paperworkers* v. *United States, supra; United States* v. *Sheet Metal Workers, Local 36, supra;*

Local 53, Int'l Ass'n of Heat & Frost Workers v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969); *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va. 1968).

5. The government has shown probability of ultimate success on the merits, that the harm which will occur if the preliminary injunction is not issued far outweighs the harm to the union and the fact that the granting of relief herein is in the public interest. Hence, the government is entitled to preliminary relief in this case. See cases cited in the Government's Memorandum of Law submitted in support of this motion, dated November 9, 1971.

Dated: New York, New York
January 3, 1972.

DUDLEY B. BONSAL
U.S.D.J.

Order of Bonsal, *U.S.D.J.*, Granting 169 Minority Workers Full Journeyman Status

[Filed January 3, 1972]

UNITED STATES DISTRICT COURT
Southern District of New York

[Filed January 3, 1972]

71 Civ. 2877

United States of America,

Plaintiff,

—against—

Local 638, *et al.*,

Defendants.

Plaintiff, the United States of America, having moved by Order To Show Cause dated November 9, 1971 for the issuance of a preliminary injunction enjoining defendant Local 638, Enterprise Association, etc. ("Local 638") from denying to qualified minority workmen union membership on terms and conditions, and with rights, privileges and responsibilities equal to all other workmen enjoying journeyman status in the Building and Construction Trades Branch of Local 638, without regard to race or national origin, and the Court having heard testimony at hearings commencing on November 26, 1971, and having read and filed the affidavits and exhibits submitted in support of said motion and in opposition thereto; and after due deliberation and after rendering and filing Findings of Fact and Conclusions of Law, it is hereby

Ordered, that the 169 minority workers whose names are set forth on the annexed Exhibit A, which is made a part of this Order, are hereby granted full journeyman status in the Building and Construction Trades Branch, ("A Branch") of Local 638, with rights, privileges and responsibilities equal to those of all other members enjoying full journeyman status, these rights and privileges to include the services provided by Local 638 in assisting members of the A Branch in obtaining and retaining employment with steamfitting industry employers in New York City and Long Island; and it is further

Ordered, that Local 638 shall, within one week of the date of this Order, inform each of the minority workers whose name is set forth on the annexed Exhibit A, in writing, of his A Branch status as hereinabove set forth and of the provisions for payment of the initiation or transfer fee and dues, and of the amounts and dates such payments are due, as hereinafter set forth; and it is further

Ordered, that the initiation or transfer fees payable by the said minority workers shall be those charged other members of the A Branch similarly situated and presently in force, and shall be payable at the union office, 841 Broadway, New York City, in equal weekly installments over a period of 10 weeks commencing two weeks from the date of this Order, for which receipts will be given by Local 638; and it is further

Ordered, that, as of the date of this Order, said minority workers shall be liable to pay the union dues charged to other members of the A Branch similarly situated and presently in force, on the same basis as union dues paid by other members of the A Branch, such payment to commence two

weeks from the date of this Order, for which receipts will be given by Local 638 until the formal issuance of appropriate A-Branch Union Book; and it is further

ORDERED, that within 45 days of the date of this Order, or immediately upon payment in full of the aforesaid initiation or transfer fee, whichever shall later occur, Local 638 shall issue or cause to be issued formal membership documentation, including the appropriate A-Branch Union Book, to each of the said minority workers as is issued to all other journeymen members of said A Branch; and it is further

ORDERED, that within 30 days of the date of this Order, Local 638 shall have the right, if it deems any of said minority workers to be incompetent, to apply to this Court for an Order striking the name of such allegedly incompetent minority workers from Exhibit A annexed to this Order, such application being independent of but not in lieu of the preceding paragraphs of this Order; and it is further

ORDERED, that within 60 days of the date of this Order, Local 638 shall submit to the Court proposed objective qualifications and procedures, including a description of any practical and written examination(s), for admission of workers, regardless of race or national origin, to full journeyman status in the A Branch which procedures shall take effect upon approval by the Court, and shall be applied to all applicants to the A Branch during the pendency of this action; and it is further

ORDERED, that the Court retains jurisdiction for the purpose of effectuating this decree.

Dated: New York, New York
January 3, 1972

DUDLEY B. BONSAL
U.S.D.J.

Opinion of Bonsal, *U.S.D.J.*,
Dated May 5, 1975

UNITED STATES DISTRICT COURT,

S. D. NEW YORK.

May 5, 1975.

Nos. 71 Civ. 847, 71 Civ. 2877.

GEORGE RIOS *et al.*,

Plaintiffs,

v.

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A. *et al.*,

Defendants.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A. *et al.*,

Defendants.

BONSAL, *District Judge.*

This Court, upon remand from the Court of Appeals after an appeal by defendant Enterprise Association Steamfitters Local 638 of U.A. ("Local 638" or the

"Union"), has reconsidered, as discussed herein, the percentage goals for non-white membership in the A Branch of Local 638[1] as originally provided by this Court's Order and Judgment of June 21, 1973. 360 F.Supp. 979 (S.D.N.Y. 1973).

This case is a consolidation of two actions for the purposes of trial: one of these actions was brought by four non-white workers alleging unlawful employment discrimination by Local 638, the Mechanical Contractors' Association of New York, Inc. ("MCA"), and the Joint Steamfitting Apprenticeship Committee of the Steamfitters' Industry ("JAC"), in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., of 42 U.S.C. §§ 1981 and 1983, and of the Fifth and Fourteenth Admendments (Rios v. Enterprise Association Steamfitters Local 638 of U.A., et al., 71 Civ. 847); and the other action is one of several suits brought by the Attorney General of the United States under Title VII of the Civil Rights Act of 1964, pursuant to the authority granted to him in that Act (42 U.S.C. § 2000e6-(a)) against several local unions in the building trades industry servicing metropolitan New York (Equal Employment Opportunity Commission v. Enterprise Association Steamfitters Local 638 of U.A., et al., 71 Civ. 2877). By Order and Judgment filed June 21, 1973, this Court permanently enjoined the defendants from engaging in any act or practice which had the purpose or effect of discriminating against any individual or class of individuals on the basis of race, color or national origin.

[1] Local 638 has two branches: a construction branch or A Branch, whose members have the status of journeymen and do mainly construction work; and a metal trades or B Branch, whose members work in shops and do repair work. The actions at bar involved only the A Branch.

By the Order and Judgment of June 21, 1973, this Court directed the parties to submit to the Administrator appointed therein, Vincent D. McDonnell, Esq., an "affirmative action program" designed to secure admission of a sufficient number of non-whites to membership as journeymen in Local 638's A Branch "to achieve a minimum goal of 30% non-white membership by July 1, 1977." On March 29, 1974 this Court adopted an "Affirmative Action Plan" (the "Plan") to implement the terms of the Order of June 21, 1973 and directed that the minimum goal of 30% non-white membership in the A Branch be achieved in four stages: 15% by July 15, 1974; 20% by July 15, 1975; 25% by July 15, 1976; and 30% by July 1, 1977.

Local 638 appealed from several aspects of this Order and Judgment. See Rios v. Enterprise Association of Steamfitters Local 638, 501 F.2d 622, 627 (2d Cir. 1974). The Court of Appeals affirmed this Court's Order but remanded for a "reassessment of the percentage goal figure" for non-white membership in Local 638 in light of relevant statistical data. 501 F.2d at 633.

In reassessing the percentage goal, this Court notes the guiding principle, as stated by the Court of Appeals:

> "[T]he objective of remedial quotas is a limited one. It seeks to place eligible minority members in the position which the minority would have enjoyed if it had not been the victim of discrimination." 501 F.2d at 632.

The Court of Appeals recommended the use of "reliable statistics with respect to [members of the male] *labor force*" living within the jurisdiction of Local 638,[2] stated

[2] There are seven counties within the jurisdiction of Local 638: New York, Bronx, Kings, Queens, Richmond, Nassau and Suffolk.

that this Court should "be guided by the most precise standards and statistics available," and noted that the Court "in prescribing non-white goals must at all times be limited to eradication of past discrimination." 501 F.2d at 633. *See also* Patterson v. Newspaper and Mail Deliverers' Union, 514 F.2d 767 (2d Cir. 1975).

At the hearing held on April 17 and 18, 1975, the Court heard the expert testimony of Dr. Marc Rosenblum offered by the plaintiffs and the government, and of Mrs. Shirley Gilbert offered by the defendants Local 638 and MCA. After considering these witnesses' testimony and reviewing the Bureau of the Census data received as exhibits at the hearing, the Court concludes that the July 1, 1977 percentage goal for non-white membership in the A Branch of Local 638 should be 26%.

The Basic Calculations

A starting point for calculations is the fact that 19.79% of the male labor force in the jurisdiction of Local 638 is black and Puerto Rican.[3] *1970 Census of Population, General Social and Economic Characteristics, New York,* PC(1)–C34 (hereinafter referred to as *"General Characteristics"*).

This figure initially must be refined to include only members of the male civilian labor force since men in the armed forces were not available for work as steamfitters. *See generally, General Characteristics, supra,* Tables 119-131; *id.,* Appendix B, at 15.

[3] "Puerto Ricans" in the Census calculations include persons who were born in or have at least one parent who was born in Puerto Rico. *1970 Census of Population, General Social and Economic Characteristics, New York,* PC(1)–C34. Appendix B, at 7.

In selecting the appropriate Census data for the percentage goal calculation, the Court finds that labor force figures in the 1970 Census are a good measure of the relevant labor force even though those data reflect persons who were age 16 in 1970. Only persons age 18 and older have ever been eligible for membership in Local 638, but an individual who was 16 years old in April, 1970 (when the Census data was collected) would have reached at least age 19 by June 21, 1973, the date of this Court's Order, and thus would have met the Union's age requirement.

The plaintiff class, as defined prior to trial, encompassed "Negro and Spanish Sur-named Americans" residing within the jurisdiction of Local 638 who had the skill or the capability and interest to learn the skill of a journeyman steamfitter. Rios v. Enterprise Association Steamfitters Local Union #638, 54 F.R.D. 234, 237 (S.D.N.Y. 1971). Data on Negro and Puerto Rican males are readily available (*see General Characteristics, supra,* Tables 126, 131), but there are no statistics by the Bureau of the Census on Spanish Sur-named individuals in the New York area. *See id.* Appendix B, at 7. Therefore, absolute precision in this regard is not possible. The Court concludes that statistics on non-Puerto Rican Spanish Sur-named males in the labor force can best be calculated from data compiled for the Spanish Language population.[4] To determine the labor

[4] "Spanish Language" persons are those individuals with "Spanish mother tongue and all other persons in families in which the head or wife reported Spanish as his or her mother tongue," where "mother tongue" refers to "the language spoken in the person's home when he [or she] was a child. If both English and another mother tongue were reported, preference was given to the language other than English." *1970 Census of Population, Subject Reports, Persons of Spanish Origin,* PC(2)–1C, Appendix C, at 6.

In adopting the use of Spanish Language as the basis for the forthcoming calculations, the Court opts against using the alternative classification of "Spanish Origin" persons, *i.e.,* persons who

force statistics on Spanish Language males, it is necessary first to determine the ratio of the number of Spanish Language males in a given county to the number of Puerto Rican males in that county (each of which numbers are available in the Census reports),[5] and then to multiply the number of Puerto Rican males in the labor force in that county by the corresponding ratio.[6]

Also relevant to the calculation of the percentage goal is the indication from the Census data that 11.6% of "Spanish Origin" males in the labor force within the jurisdiction of Local 638 are black.[7] *1970 Census of Population, Subject Reports, Persons of Spanish Origin,* PC(2)–1C, Table 2. As a result, certain individuals have been "double-counted", once as a black and once as a member of the Spanish Origin group, thereby artificially inflating any statistic derived by

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replied to the Census question on origin or descent that they were any of the following: Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish. *Id.* at 7. The Court finds that the Spanish Origin classification is less desirable than the Spanish Language group as a basis for the computations herein because responses by individuals indicating that they are of Spanish Origin are particularly subjective and the Spanish Origin statistics reported by the Census are based upon only a 5% sampling, rather than the 15% sampling utilized to derive the Spanish Language data.

[5] *See General Characteristics, supra,* Tables 119 & 129.

[6] The formula would therefore be, for each county:

$$\text{No. Puerto Rican males in labor force} \times \frac{\text{No. Spanish Lang. males in population}}{\text{No. Puerto Rican males in population}}$$

See id., Tables 119, 129 & 131.

[7] The parties have provided the Court with no relevant figures based upon the group of Spanish Language persons; however, the parties have agreed to use the Spanish Origin statistic for the purpose of determining the double count.

adding figures concerning blacks to figures covering Spanish Language individuals. Therefore, the percentage goal calculations described below include a reduction of 11.6%.

Taking into account the foregoing basic factors, the number of non-white males in the labor force in the jurisdiction of Local 638 may be obtained by taking the sum of the results of the following computations performed by county:

TOTAL NUMBER OF NON-WHITE MALES IN LABOR FORCE=

$$\text{Number of Black males in labor force} + \text{Number of Puerto Rican males in labor force} \times \frac{\text{No. Span. Lang. males in popul'n}}{\text{No. Puerto Rican males in popul'n}} \times (1\text{-}11.6\%)$$

After adding up the results for the seven counties, the percentage goal then may be derived by the following formula:

$$\text{PERCENTAGE GOAL} = \frac{\text{Total number of non-white males in labor force within Union's jurisdiction}}{\text{Total number of males in labor force within Union's jurisdiction}}$$

which yields the figure 22.7%. *See* General Characteristics, *supra,* Tables 121, 126.

Educational Factor

In seeking to determine a more accurate percentage goal, the Court finds that the educational achievement of steamfitters should be taken into account. The Census reports indicate that the median[8] educational level for pipefitters

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[8] A "median" is the middle number in a series, "a value in an ordered set of values below and above which there are an equal number of values." *Webster's Third New International Dictionary,* at 1402 (1961).

and plumbers (the Census category acknowledged by the parties as the appropriate indicator) is 11.9 years (*1970 Census of Population, Subject Reports, Occupational Characteristics,* PC(2)–7A, Table 5 (hereinafter referred to as "Occupational Characteristics")) and the mean[9] educational level is only 10.6 years (*1970 Census of Population, Subject Reports, Occupation by Industry,* PC(2)–7C, Table 3, at 130). Even more significant is the fact that as of 1970, 91.8% of the pipefitters and plumbers reported by the Bureau of the Census had completed only four years of high school or less. *See Occupational Characteristics, supra,* Table 5. Therefore, the realistic labor pool for 91.8% of the membership of Local 638[10] consisted of males in the labor force in the jurisdiction of the Union who, as of 1970, had completed no more than four years of high school.[11] The Census data reveals that a smaller percentage of non-white males attended college than white males, leaving a disproportionately large percentage of non-whites in the "high school or less" educational category. *See General Characteristics, supra,* Tables 126, 129, 130; *Occupational Characteristics, supra,* Tables 5 & 6. The Court recognizes, on the other hand, that account should be taken of the relatively small proportion of non-whites in the 8.2% group of pipefitters and plumbers who have completed at least one year of post-high school education. Calculations analogous to those performed in the preceding section, but with adjustments for these educational factors, result in a percentage goal of 27.2%.

[9] The "mean" is what is commonly known as the "average" of a group of numbers. *See id.* at 1399.

[10] The parties and Court have assumed, for the purposes of the calculations herein, that the national educational achievement of pipefitters and plumbers is an appropriate gauge of the educational achievement of the membership of Local 638.

[11] The Court notes that there has never been a high school requirement for direct admission into the A Branch of Local 638. *See* United States v. Local 638, etc., 337 F.Supp. 217, 218 (S.D. N.Y.1972) (Finding of Fact #11). Use of this criterion is not intended to indicate approval of the requirement of a high school diploma (or its equivalent) which currently is necessary for admission to the Apprenticeship Program sponsored by Local 638, but which requirement the Administrator has been instructed to review. *See* United States v. Local 638, etc., 360 F.Supp. 979, 993 (S.D.N.Y. 1973). Rather, the use of the educational factor is intended to render a percentage goal which reflects as accurately as possible the realistic makeup of the Union as of 1970.

However, the Court takes notice of the Census data indicating that approximately 75% of the group of pipefitters and plumbers with four years of high school or less (the 91.8% group described above) had completed between one and four years of high school (*see Occupational Characteristics, supra,* Table 5), but that non-whites comprise a statistically significant larger proportion of the 25% group which have no high school education than they do of the 75% group. *See* Union's Exhibit D (chart prepared for the hearing). The parties performed no calculations taking this aspect of the educational data into account, but the Court finds that its consideration is necessary and results in a lowering of the percentage goal.

The Undercount

Another factor in the statistical analysis necessary to establish a percentage goal which is as accurate as possible is the population "undercount", defined as omission in coverage of the decennial Census. The undercount is computed by the Bureau of the Census and is used by the Bureau to update the decennial Census findings in the intermediate years. *See 1970 Census of Population and Housing, Evaluation and Research Program, Estimates of Coverage*

of Population by Sex, Race, and Age: Demographic Analysis, PHC(E)–4 (issued Feb. 1974). The Bureau of Census reports that the national[12] undercount for Negro males was 9.9% while that for white males was only 2.4%. *Id.,* Table 3, at 29. Inclusion of this factor in the computations raises the percentage goal to 28.8%.

Conclusion

Taking into account the basic factors noted above, as well as both considering the heavier concentration of non-whites in the group without any high school education and allowing for possible overinclusiveness of the Spainsh Language data as a substitute for statistics for Spanish Sur-named persons, the Court finds that the 1977 percentage goal should be 26%. *Cf.* Patterson v. Newspaper and Mail Deliverers' Union, *supra.*

The Court rejects plaintiffs' contentions that the percentage goal should reflect the location of work within the Union's jurisdiction. In the context of the steamfitting industry, the assumption that workers would not travel outside their county of residence seems unwarranted.

The Court also finds that it is inappropriate to inflate the percentage goal because of the alleged high non-white representation in a group known as "discouraged workers", persons who have ceased looking for work and therefore do not fall within the Census definition of "unemployed", which thereby prevents their inclusion in the "labor force" cate-

[12] There are no regional statistics compiled; the national figures are therefore the best available. *See 1970 Census of Population and Housing, Evaluation and Research Program, Estimates of Coverage of Population by Sex, Race, and Age: Demographic Analysis,* PHC(E)–4, at 3 (issued Feb. 1974).

gory. *See General Characteristics, supra,* Appendix B, at 15. While this factor may well be a recognized phenomenon, empirical data seems too speculative to permit reliance by the Court, and no reliable statistical material has been submitted.

Accordingly, the Court finds that the percentage goal of 26% non-white membership in Local 638 by July 1, 1977 is reasonable and amply supported by reliable factual data.

Goals for the intermediate years shall be 18% by July 15, 1975 and 23% by July 15, 1976, and the Affirmative Action Plan will be modified accordingly in the Order to be entered herein.

The foregoing shall constitute the Court's findings of fact and conclusions of law.

Settle Order on Notice.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-768

GEORGE RIOS, *et al.*,

Petitioners,

—v.—

ENTERPRISE ASSOCIATION STEAMFITTERS, LOCAL NO. 638 OF U.A., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT JOINT STEAMFITTING APPRENTICESHIP COMMITTEE IN OPPOSITION

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INDEX

Citations

Cases:

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BRIEF FOR RESPONDENT JOINT STEAMFITTING APPRENTICESHIP COMMITTEE IN OPPOSITION

Opinions Below

The relevant opinions below are adequately set forth in the Appendix to the Petition.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Did the district court, as the court of appeals found, act appropriately within its discretion in denying back pay to unskilled applicants to an apprenticeship program who failed standardized aptitude tests selected in good faith reliance on the opinion of experts and without discriminatory intent?

Statutory Provision Involved

The relevant statutory provision, 42 U.S.C. § 2000e-5(g), is set forth in the Petition.

Statement of the Case

On February 26, 1971, Petitioners filed a class action alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (the "Act"). Respondent Joint Steamfitting Apprenticeship Committee of the Steamfitters Industry Educational Fund ("JAC") is a joint labor-management committee which supervises the selection and training of apprentices in the steamfitting industry within the jurisdiction of Respondent Enterprise Association Steamfitters, Local No. 638 of U.A. ("Local 638"). The JAC is itself not an employer, and employs no apprentices. It consists of eight members, all of whom are appointed by the Trustees of the Steamfitters Industry Educational Fund (the "Educational Fund"). The Educational Fund was created by a 1960 Declaration of Trust pursuant to which four of its Trustees are appointed by Local 638 and four by Respondent Mechanical Contractors Association of New York, Inc. ("MCA"). Neither the Educational Fund nor its Trustees were named as defendants in the instant litigation.

The sole source of funds for the Educational Fund, and accordingly for the JAC apprentice program, is payments made by the some 300 contractors who employ steamfitters pursuant to a collective bargaining agreement with Local 638. These payments to the Educational Fund are fixed by the collective bargaining agreements between these employers and Local 638. At the time of trial, the collective bargaining agreement, the effective dates of which were October 2, 1972 through June 30, 1975, required each employer to pay to the Educational Fund five cents (5¢) per hour for each hour worked by journeymen and apprentice steamfitters.

The present collective bargaining agreement, which runs through June 30, 1978, requires a payment of seven cents (7¢) per hour to the Educational Fund for each hour worked. As a necessary consequence of the severe unemployment in the construction trades in the New York City area in recent years, hours worked and accordingly contributions to the Educational Fund have greatly diminished.

Following consolidation of this case with a suit filed by the United States against Local 638 and the JAC, trial was held before the Honorable Dudley B. Bonsal, United States District Judge. On June 21, 1973, Judge Bonsal entered an Opinion (App. pp. 34ff.)* which found, *inter alia*, that certain competitive written aptitude examinations which

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* "App." signifies the Appendix to the Petition for a Writ of Certiorari filed herein.

the JAC had used in the selection of apprentices from 1964 until 1971 had a differential impact on non-whites and could not "be considered job related, notwithstanding the difficulty of devising a fair test or of testing it [sic] for validity" (App. p. 58).

These examinations, the impact of which is the sole basis for the finding that the JAC violated the Act, were selected initially with the advice of New York University and the Stevens Institute of Technology. Moreover, as the district court noted, the apprenticeship program was designed in consultation with the United Association and the Mechanical Contractors Association of America and was registered with the United States and New York State Departments of Labor. There was no evidence that the JAC, either in its administration and grading of the examination or in the oral interviews of potential apprentices, had in any way intended to, or did, discriminate against non-whites.

Because of the unavailability of tests validated for steamfitters in accordance with the Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 *et seq.*, and given the fact that the JAC itself lacked the financial resources to undertake a costly validation study, Judge Bonsal approved for use by the JAC the General Aptitude Test Battery ("GATB") of the United States Training and Employment Service which, though not fully validated, had not been proven to have a differential impact on non-whites.

Indeed, Judge Bonsal, on June 21, 1973, ordered far-ranging remedial relief for Petitioners with regard to the apprenticeship program (App. pp. 69-81), including:

(i) Use of the GATB;

(ii) Mandatory indenturing by the JAC, during 1973, of a minimum of 400 apprentices, of whom 175 shall be white, thereby doubling the size of the apprenticeship program;

(iii) Mandatory indenturing of at least 30% non-whites in each year for the years 1973-1977;

(iv) An increase in the maximum age for applicants to the JAC training program from 24 to 30, so that any person who failed the examination between 1967 and 1971 would have full opportunity to apply again for admission; and

(v) Appointment of an Administrator, at the expense of all defendants, including the JAC, to implement and supervise the performance of the remedial program.

Judge Bonsal, however, reserved decision at that time on the issue of back pay.

Two years later, after implementation and supervision of this far-ranging remedial program, Judge Bonsal, in the exercise of the clear discretion given him under Title VII, denied back pay in behalf of unskilled persons denied admission to the apprenticeship program. The Court noted that "equitable considerations," including the speculative nature of any alleged injury to the class and the reliance by the JAC on the recommendation of experts, including the United States and New York State Departments of Labor, militated heavily against imposing back pay awards against the JAC (App. pp. 3-4).

Petitioners sought review of this aspect of Judge Bonsal's relief (as well as other facets of the opinion not presented in the Petition). The court of appeals affirmed the denial of back pay to unsuccessful apprentice applicants, relying on the lower court's intimate knowledge of the litigation and institution of the remedial program, and finding specifically that Judge Bonsal had not abused his discretion in denying back pay relief to this group (App. pp. 20-21).

REASONS FOR DENYING THE WRIT

The Denial of Back Pay Is Consonant With, and Appropriate Under, the Controlling Statutory Provision and Decisions of This Court.

The decision of the court of appeals is an appropriate and correct application of the relevant standards set forth in Title VII of the Act, as construed by this Court and the various courts of appeals. Petitioners have not only had extensive and careful consideration given to the issues by the district judge, but have also had a full and fair hearing before the court of appeals on the propriety of the lower court's exercise of remedial discretion, which the appellate court expressly found "was not abused in this instance" (App. p. 21).

Under the applicable statutory provision, 42 U.S.C. § 2000e-5(g), this Court has made it clear:

> It is true that back pay is not an automatic or mandatory remedy; like all other remedies under the Act, it is one which the courts "may" invoke. The scheme implicitly recognizes that there may be cases calling for one remedy but not another, and—owing to the structure of the federal judiciary—these choices are, of course, left in the first instance to the district courts. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 416-17 (1975).

The express language of the back pay provision of Title VII is itself couched in terms which point directly to the discretion of the trial court, stemming from its closeness to the controversy and its appreciation of the overall context in which claims for back pay are made. Here, Judge Bonsal not only had the opportunity to observe this matter from his perspective as trial judge, but in addition closely supervised the Affirmation Action Program for almost three years after trial and before his back pay decision. Under such circumstances, his exercise of discretion is surely to be afforded great weight.

Petitioners contend that the decisions of both the district court and the court of appeals in the instant case "are directly contrary to this Court's ruling" in *Albemarle Paper Co., supra* (Pet. p. 14).* *Albemarle,* however, held only that the district court's conceded discretion may not be "unfettered by meaningful standards or shielded from thorough appellate review," and that it is inappropriate, given the purposes of Title VII, to "condition the awarding of back pay on a showing of 'bad faith'." *Id.* at 416, 423. *Albemarle,* then, held only that "under Title VII, the mere absence of bad faith . . . does not depress the scales in the employer's favor." *Id.* at 422. *Rios,* unlike *Albemarle,* involved not a "mere absence of bad faith," but actual "good

*"Pet." signifies the Petition for a Writ of Certiorari filed herein.

faith [reliance] on the recommendation of experts" (App. p. 4). Petitioners' position that good faith may never influence the exercise of the trial court's discretion is not supported by either this Court's decision in *Albemarle* or by the explicit language of § 2000e-5(g), *supra*. As Justice Rehnquist noted in *Albemarle*:

> I do not read the Court's opinion to say, however, that the facts upon which the District Court based its conclusion . . . would not have supported a finding that the conduct of Albemarle was reasonable under the circumstances as well as simply being in good faith. Nor do I read the Court's opinion to say that such a combination of factors might not, in appropriate circumstances, be an adequate basis for denial of back pay. *Id.* at 444 (concurring opinion).

Petitioners' position that a defendant's good faith may *never* influence the exercise of the trial court's discretion is clearly at odds both with the express statutory language of § 2000e-5(g) and with the relevant decisions of this Court. Title VII provides that a back pay award "may" be made in the case of a defendant, if "appropriate," who has "*intentionally* engaged in or is *intentionally* engaging in an unlawful employment practice." Petitioners apparently take this Court's holding in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), to mean that, so long as an act or omission is discriminatory in impact, no inquiry into the *bona fides* of a defendant is appropriate. But *Griggs* involved § 703(h) of the Act (42 U.S.C. § 2000e-2(h)) which, as this Court noted, speaks of ability tests that are "designed, intended or *used* to discriminate because of race . . . " *Griggs, supra,* 401 U.S. at 433 (Court's emphasis). Respondent does

not suggest that its good faith precludes a finding of *liability* for violation of the Act, but rather states only that good faith may be relevant to the issue of appropriate remedy, since the affirmative presence of good faith, as Justice Rehnquist recognized, may be relevant to "a finding that the conduct of [the defendant] was reasonable under the circumstances." *Albemarle, supra,* 422 U.S. at 444.* To remove altogether from the scope of the lower court's discretion the presence of a defendant's good faith would therefore run afoul of the clear statutory language and judicial exegesis of Title VII.

Respondent's good faith reliance on experts is particularly significant where, as here, liability rests solely on disproportionate impact of testing performance and not on any purposefully discriminatory acts by Respondent. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Washington* v. *Davis,* 426 U.S. 229, 242 (1976). See also *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* —— U.S. ——, 45 U.S.L.W. 4073 (1976). Although both *Washington* v. *Davis* and *Village of Arlington Heights* were decided upon constitutional grounds, "the similarities between the congressional language [of Title VII] and some of those decisions [construing the Equal Protection Clause] surely indicates that the latter are a useful starting point in interpreting the former." *General Electric Co.* v. *Gilbert,* —— U.S. ——, 97 S.Ct. 401 at 407 (1976).

Moreover, a back pay award against the JAC, given its limited financial resources, would severely damage the

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* Plaintiffs who are able to show discriminatory impact of ability tests where the defendant's conduct was "reasonable under the circumstances" would not be left without remedy; the use of the offending test could surely be enjoined.

JAC's ability to conduct the remedial program ordered by Judge Bonsal. Indeed, because the JAC is not an "employer, employment agency, or labor organization," an award against it would be outside the statute's scope and therefore inappropriate.*

In essence, then, Judge Bonsal's denial of back pay was well within the boundaries of equitable discretion established by this Court in *Albemarle, supra.* To hold otherwise would strip trial courts altogether of the residual discretion which Congress recognized was necessary to insure a full and fair implementation of Title VII in accordance with "principles of equity." *Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F.2d 1364, 1382 (5th Cir. 1974).

Equally incorrect is Petitioners' contention that the decisions of the district court and court of appeals "misallocate[d] the burden of proof and cannot be reconciled with the applicable decisions of this Court . . ." (Pet. p. 20). In fact, neither the court of appeals nor the district court spoke to the allocation of the burden of proof. Instead, the district court found that the speculative nature of alleged economic injury, when combined with the JAC's reliance on the registration of its tests with the United States and New York State Departments of Labor, constituted sufficient "equitable considerations" militating against any award of back pay (App. p. 4). The court of appeals, in affirming the trial court's exercise of discretion, similarly pointed to the remoteness of the alleged injury to the unsuccessful apprentice applicants as a factor appropriately considered by the district court in fashioning appropriate equitable relief (App. pp. 20-21).

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* Compare 42 U.S.C. § 2000e-5(b) with 42 U.S.C. § 2000e-5(g).

Moreover, it is clear that where, as here, "injury is too remote" and, with regard to the class generally, "damages suffered by them [are] altogether too speculative" (App. p. 21), back pay may be denied on a class-wide basis.

As the court of appeals noted in *United Transportation Union Local No. 974* v. *Norfolk and Western Ry.,* 532 F.2d 336, 341 (4th Cir. 1975), *cert. denied,* —— U.S. ——, 96 S.Ct. 1664 (1976), even in the class action context, "to justify an award [of back pay] plaintiffs must prove that there is a class whose members suffered economic loss as a result of discrimination." Where, as here, alleged economic damage is so speculative as to render such proof impossible, the trial court is well within the appropriate bounds of its discretion in finding that a back pay award is not "appropriate" under Title VII. Petitioners' reliance on *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747 (1976), is misplaced. That case involved the appropriate standards in granting an award of retroactive *seniority,* a remedy which is "far less drastic for a defendant to be required to bear than back pay." *EEOC* v. *Local 638 . . . Local 28 of the Sheet Metal Workers' International Ass'n,* 532 F.2d 821, 833 n. 6 (2d Cir. 1976). Moreover, *Franks* involved proven discriminatory practices in the hiring, transfer and discharge of employees, rather than in admission to an apprenticeship program a full step removed from the actual employment process.

As a consequence, the district court and court of appeals appropriately considered the speculative nature of the alleged injury to the class in denying back pay.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 76-768

In the Supreme Court of the United States

OCTOBER TERM, 1976

GEORGE RIOS, ET AL., PETITIONERS

v.

ENTERPRISE ASSOCIATION STEAMFITTERS, LOCAL NO. 638 OF U.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals dealing with back pay (Pet. App. 9–33) is reported at 542 F. 2d 579. The opinion of the district court on back pay (Pet. App. 1–8) is reported at 400 F. Supp. 988. An earlier opinion of the court of appeals (Pet. App. 82–113) is reported at 501 F. 2d 622 and that of the district court (Pet. App. 34–68) at 360 F. Supp. 979.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1976. The petition for a writ of cer-

tiorari was filed on December 6, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below erred in denying back pay to members of the plaintiff class who were discriminatorily denied access to employment opportunities as apprentices in violation of Title VII of the Civil Rights Act of 1964.

STATEMENT

On February 26, 1971, petitioners filed a class action against respondents Enterprise Association Steamfitters, Local 638 ("Local 638" or "the union"), the Mechanical Contractors Association of New York, Inc. ("MCA"), and the Joint Steamfitting Apprenticeship Committee of the Steamfitters Industry Education Fund ("JAC") alleging employment discrimination against black and Spanish surnamed individuals in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq.* The action was consolidated with a Title VII suit filed by the Attorney General of the United States alleging that Local 638 and JAC had engaged in a pattern and practice of discrimination against nonwhites. The court subsequently substituted the Equal Employment Opportunity Commission as party plaintiff in the government's action pursuant to 42 U.S.C. (Supp. V) 2000e-6(c).

The district court, after an extended trial, found that the union had unlawfully discriminated against

nonwhites in virtually every aspect of its membership and work referral practices (Pet. App. 50–62). Of particular relevance here, the court found that, through the use of a discriminatory written aptitude examination, nonwhites had unlawfully been denied an equal opportunity to gain admission to union membership through the apprenticeship program (Pet. App. 57–58).[1] The discriminatory tests had disqualified a far greater proportion of nonwhite than white applicants[2] and were not shown to be job-related (Pet. App. 46, 57–58, 67).

Having concluded that the plaintiff class had been unlawfully discriminated against in admissions to the apprenticeship program, the district court nonetheless refused to award back pay (Pet. App. 3–4). The

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[1] At the time of trial, the apprenticeship program was a five-year program, consisting of 9,100 hours of fully paid employment as apprentice steamfitters and 720 hours of classroom training for most of which apprentices were paid a salary. Apprentices were paid a percentage of a journeyman's wages according to the following schedule (Pet. App. 44–45):

1st year—40% of journeyman wages
2nd year—50% of journeyman wages
3rd year—60% of journeyman wages
4th year—70% of journeyman wages
5th year—85% of journeyman wages

[2] Only 21.48% of the minority applicants passed the test while 41.37% of the whites passed it. Because of the disproportionate impact of the tests, only 3.99% of the persons admitted to the apprenticeship program during those years were minorities although they comprised nearly 10% of the total number of applicants (Pet. App. 46, 67). The number of minority applicants in those years (124) was far less than the number of actual vacancies (526) (Pet. App. 67).

court of appeals, by a divided panel, affirmed, ruling that individual monetary harm resulting from the discrimination was too speculative or hypothetical (Pet. App. 20–21). The writer of the opinion, Judge Oakes, would have granted back pay to those who were victims of discrimination in the apprenticeship program because their situation was indistinguishable from the nonwhite journeymen granted an opportunity to prove their back pay claims (Pet. App. 20). However, as Judge Oakes explained (Pet. App. 20–21):

> My brothers Mansfield and Gurfein, however, feel quite otherwise. They believe it to be within the proper exercise of the conceded discretion of the district court, *Albemarle, supra,* 422 U.S. at 421–23, to deny as hypothetical any back-pay in connection with the apprenticeship program, at least where, as here, there was no purposefully bad motive. In their view, even though would-be nonwhite apprentices were victims of discrimination by the JAC, their injury is too remote, and any damages suffered by them altogether too speculative in the sense of the problem of proof, to permit an award. In this regard my brothers point out that an applicant would have to prove the following essential elements to recover:
>
> That if nondiscriminatory tests for admission to the program had been formulated and administered (which, of course, never occurred), the applicant would have passed them;

> That he would have progressed satisfactorily through the three- or four-year program to graduation; and
>
> That he would then have obtained employment as a steamfitter.

ARGUMENT

Although the United States and the Equal Employment Opportunity Commission did not elect to file a petition for a writ of certiorari in this case, we believe that the decision of the court of appeals was erroneous.

1. Having found that the apprenticeship program did in fact discriminate against nonwhites, the courts below wrongly precluded the individual claimants from demonstrating how they were damaged by that discrimination. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405; *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747. The back pay issues arising out of the discriminatory exclusion from a salaried apprenticeship program are no more speculative in quality than back pay questions generated by exclusion from any other salaried employment. By its very nature, the process of resolving back pay claims involves hypothetical considerations as to what would have occurred absent the defendant's unlawful conduct, and as a result "[u]nrealistic exactitude is not required." *Pettway* v. *American Cast Iron Pipe Co.,* 494 F. 2d 211, 260 (C.A. 5); *Meadows* v. *Ford Motor Co.,* 510 F. 2d 939, 946 (C.A. 6).

Since the defendant's unlawful conduct has created the necessity for these difficult back pay judgments any "uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating [defendant]." *Pettway* v. *American Cast Iron Pipe Co., supra,* 494 F. 2d at 260–261.[3]

The court of appeals' decision precluding back pay because of what are fairly typical difficulties in making back pay determinations is contrary to the congressional intent to establish an effective Title VII remedy and to the principle that "backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 421. See, also, *Johnson* v. *Goodyear Tire and Rubber Co.,* 491 F. 2d 1364, 1379 (C.A. 5).

2. The court of appeals' ruling as to the burden of proof that individual class members must meet in order to obtain back pay benefits is also incorrect. The court stated that a class member discriminatorily excluded from salaried apprenticeship could not obtain a back pay award without demonstrating that "if nondiscriminatory tests for admission to the program had been formulated and administered * * *,

[3] See also *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 773, n. 32; *Day* v. *Mathews,* 530 F. 2d 1083, 1086 (C.A.D.C.).

the applicant would have passed them" (Pet. App. 21).[4]

The burden placed by the court of appeals on injured class members is impossible to meet and, if applied generally, would frustrate the statutory goal of making whole the victims of past discrimination. See *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 421. In a Title VII action the initial burden is on the plaintiff to demonstrate that he is within the class discriminated against, and that he was both available and eligible for those positions. *Pettway* v. *American Cast Iron Pipe Co., supra,* 494 F. 2d at 259–260. But where one of the stated requirements for a position has been found discriminatory, eligibility is determined not by reference to some hypothetical test, but to those nondiscriminatory criteria actually employed. *Baxter* v. *Savannah Sugar Refining Corp.,* 495 F. 2d 437, 444–445 (C.A. 5). Plaintiffs, who in this case have proven discrimination against the class, need only show that they were eligible to do the work when judged by the nondiscriminatory criteria actually utilized by JAC (including age, residency, and physical ability) (Pet. App. 47) in order to demon-

[4] The court also stated that the applicant must demonstrate that he would have satisfactorily progressed through the apprenticeship program and required proof that the applicant would have obtained employment as a steamfitter (Pet. App. 21). Apparently, the court failed to recognize that the apprenticeship program was itself an employment opportunity, and that back pay was required to remedy a discriminatory exclusion independent of whether plaintiffs would have obtained future job opportunities.

strate their entitlement to a back pay remedy. The perpetrator of the unlawful conduct bears the burden of resolving any uncertainties concerning hypothetical performance. Cf. *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 773, n. 32.[5]

A proper allocation of proof does not mean that back pay relief will be awarded to every class member. The respondents are entitled to show that the claimant would not have been selected for the apprenticeship program for reasons peculiar to him. See *Baxter* v. *Savannah Sugar Refining Corp., supra,* 495 F. 2d at 445; *Day* v. *Mathews, supra,* 530 F. 2d at 1085. By reversing this burden at the outset, however, the court of appeals required the Title VII claimant to reconstruct the hypothetical past with a certainty which, because of respondent's conduct, could virtually never be attained. That result is inconsistent with the make-whole purpose of the Title VII remedy (118 Cong. Rec. 7168 (1972)).

3. Finally, to the extent that the Second Circuit accorded any weight to the absence of a "purposefully bad motive" in denying back pay (Pet. App. 21), it contravened this Court's specific holding in *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 422–423, that a defendant's good faith, or lack of bad faith, does not justify denial of a pay award.

[5] Even if it is assumed, *arguendo*, that the Second Circuit properly assigned to the claimant the burden of demonstrating that he would have passed a nondiscriminatory test, it was improper for the court to exclude claimants from attempting to meet this burden. If, for example, any of the applicants who failed the discriminatory test can show that he passed a nondiscriminatory test subsequently administered by JAC, he presumably has met his burden of proving eligibility. In this respect, it is noteworthy that in 1973, after administration of the new test, approximately 140 to 175 nonwhites were admitted to the apprenticeship program (J.A. 1121–1122).

Such an alternative cannot, however, meet the objections to the denial of back pay to members of the class. Many, if not most, of the previously rejected applicants probably did not reapply to the apprenticeship program in 1973. Because of the considerable lapse in time since they had been rejected, most of the nonwhite applicants probably found it necessary to move on to other occupations.

CONCLUSION

For the foregoing reasons, the Equal Employment Opportunity Commission does not oppose the granting of the petition for a writ of certiorari.[6]

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[6] Moreover, because argument in the court of appeals in this case took place shortly after this Court's decision in *Franks*, *supra*, and the *Franks* decision is not discussed in the portion of the opinion of the court of appeals concerning proof burdens, the Court may deem it appropriate to grant the petition and vacate the judgment of the court of appeals insofar as it sustained the denial of back pay to apprentices and apprentice applicants and remand to that court for further consideration in light of *Franks*.

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